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TRADE ASSOCIATIONS

Their Economic Significance and Legal Status

STUDIES IN PUBLIC POLICY
TOWARD BUSINESS

BY THE

NATIONAL INDUSTRIAL CONFERENCE
BOARD, INC.

247 Park Avenue, New York

Trade Associations: Their Economic Significance and Legal Status. 388 pages, with index ..... *cloth, $3.00*

The Regulation of Business Practices. (*In preparation.*)

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TRADE ASSOCIATIONS

THEIR ECONOMIC SIGNIFICANCE AND LEGAL STATUS

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NATIONAL INDUSTRIAL CONFERENCE BOARD, Inc.
NEW YORK
1925

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First Edition Published May, 1925
Second, Revised Edition Published July, 1925

FOREWORD

IT IS obvious that the industrial and commercial development of a nation is vitally influenced not only by the organization and methods of production and trade, in which the initiative and enterprise of industrial and business leadership are reflected, but by the environment of public attitudes and governmental policies in which industry and commerce live and develop. These two factors—individual enterprise and public control—are the two sides of the shield of economic progress. They must be properly related and proportioned; they must mutually sustain each other; and they must develop together in accordance with the changing needs of the times.

In pursuance of its purpose of scientific inquiry into the major economic problems affecting industrial conduct, the Conference Board undertook a comprehensive survey of the development and present position of public policy in the control of private business organization and practices, as embodied in the Sherman Act and its supplementary legislation, generally referred to as the anti-trust laws, and in the court and commission decisions and decrees based thereon. Though they do not embody the entire substance of public policy and attitude toward business enterprise, the anti-trust laws express the essential limits of private powers and rights in the field of industry and trade and, more than any other single branch of legislation, they determine the main outline of the system under which the economic processes of the nation are now organized and conducted.

It is fully recognized that there are numerous important aspects of the relation of government and public policy to industrial and commercial life which do not fall within the scope of a study of the anti-trust laws. The exercise of the police power through various kinds of social legislation, and the exercise of the taxing power through various fiscal measures, may vitally affect the conduct of business enterprise and,

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indeed, radically alter the direction of national industrial development. Control of railroads and public utilities through governmental agencies, and public policy toward agriculture and toward labor organizations all present questions of wide significance for the national economic life, which are in greater or less degree distinct from those involved in the regulation of industry and trade under the so-called anti-trust laws. These questions are not included within the scope of the present study.

The purpose of the present investigation is primarily to describe the development and to test the economic soundness of the laws regulating business organization, trade relationships and market conduct in the United States. The bearing of these laws upon industry and trade is threefold. They affect the structure and organization of business enterprises; they influence the relationships of independent business concerns; and they control the business methods and practices of separate, associated or combined business interests. Accordingly the anti-trust laws must be regarded in their relation, first, to the consolidation and combination of business interests, that is, to what are usually called the "trusts"; second, to the looser forms of organization and co-operation among separate business interests, of which the trade association is the type; and third, to the specific business methods and practices of business competitors, which come under the surveillance primarily of the Federal Trade Commission.

The present volume deals with the second of the three main aspects of these laws. It relates to the question of the legitimate limits of co-operation among independent business enterprises in the form of voluntary associations among trade competitors. This part of the broad investigation of anti-trust policy was undertaken and the results issued first because of the timely interest in the difficult and unsettled questions of public policy which have been raised by this novel form of economic organization. The trade association has become an outstanding feature of modern business, and a clear understanding of its economic functions and a clear definition of its legal status are of the highest importance for American economic development.

The purpose of this volume, however, is definitely limited

in two respects: In the first place, it is not intended to furnish a guide to business executives or to trade association officials as to what may or may not be done under the existing rules of law. The analysis contained in these pages may and should prove helpful in this respect by contributing to a clearer understanding of the present state of the law; but the primary object throughout the book is to lay a firm foundation for judgment by the general public of what constitutes proper policy toward trade associations and their activities. The legal principles which have moulded trade association development and the legal problems which surround their activities are fully studied, but emphasis has been laid throughout on the basic economic considerations upon which sound policy both in trade association activity itself and in the law must be developed.

In the second place, this study is not intended to serve as a manual of trade association activities or to provide a full description of the organization, conduct and work of trade associations in general, or of specific associations. These purposes have been sufficiently served by other publications. The present volume is concerned with the economic functions which are involved in specific trade association activities rather than with the activities themselves. In short, this report is designed as part of a broad study of public policy in relation to the economic processes which underlie the organization and methods of American business, and it reviews legal doctrines and surveys the practical accomplishments of trade associations only secondarily to this general purpose.

Throughout this study references to specific activities of trade organizations or individual concerns, where not based on official records or original sources, have been verified so far as possible by correspondence with the organizations or companies concerned.

This volume is the result of an investigation conducted by the Conference Board's Research Staff, under the supervision of the Staff Economic Council.

In the preparation of its publications, the National Industrial Conference Board avails itself of the experience and judgment of the business executives who compose its membership and of the recognized authorities in special fields, in

addition to the scientific knowledge and equipment of its Research Staff. The reports of the Board thus finally represent the result of scientific investigation and broad business experience, and the conclusions expressed therein are those of the Conference Board as a body.

In this study the Conference Board has greatly benefited by the special suggestions of many leading business executives and economists, experienced trade association officials and legal authorities especially conversant with the field of law and public policy considered in this investigation. To all of these the Conference Board wishes to express its indebtedness. The Board is under special obligation to the members of its Advisory Committee, whose close cooperation has been invaluable, viz.:

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TRADE ASSOCIATIONS

THEIR ECONOMIC SIGNIFICANCE AND LEGAL STATUS

INTRODUCTION

Trade associations are not a new development in American economic life. More or less formal organizations encompassing many competitors in particular branches of industry and dealing with a wide variety of trade interests may be traced well back into the nineteenth century. For long these groups remained in comparative obscurity. The war directed popular attention to the existence and potentialities of industry-wide trade organizations, and there has since been a growing interest in the extent and the operations of these associations. Business men as well as the general public discovered that the trade association was an efficient instrument for mobilizing productive resources in various branches of industry for the vigorous prosecution of the war. As soon as the military struggle was over, and even before, questions arose regarding the nature of this comparatively unheralded development and its meaning for American industry. How numerous and how representative are trade associations? How closely are they organized? How powerful are they? What are they accomplishing? What are their objects? Are they unjustly restricted, or do they exercise an unwarranted license?

The curiosity about these matters has been only partly satisfied by the flood of periodical literature treating of the achievements of special groups or of single aspects of trade association work. Even the several books which have dealt with the movement more comprehensively have not fully presented this type of trade organization in its proper perspective. Too frequently trade associations have been studied and described from the merely technical point of view, with a resultant neglect of the fundamental significance of the development of business co-operation, of which they

are but one form. Only by considering trade associations as a method of discharging certain functions in the industrial process, and studying from this point of view the effectiveness of their work in the current economic system and the issues which their operations raise under the current legal system, does it seem possible to reach an adequate understanding of this growing institution. And only on this basis can an intelligent adjustment of public policy toward business co-operation be brought about. It is the purpose of this book to provide a survey and an analysis of this kind.

Few have any doubt of the usefulness and lawfulness of trade associations in and of themselves. But the recent course of judicial decision, the attitude of administrative bodies, and the pronouncements of prosecuting authorities have served, justly or unjustly, to cast a shadow upon many significant trade association activities. Some of these activities are so important that their compulsory abandonment would seriously impair the vitality and usefulness of trade organization. The conflict between association practice and legal authority, consequently, has been growing sharper and sharper; and it appears to be hampering the normal development of the trade association movement.

There is, in this situation, an issue of fundamental importance for the growth of American industry. The issue is, in general terms, a question of the organization of industry; and it is generally conceded that the system under which the production and distribution of wealth is organized and directed influences vitally the volume of the national income. Concretely, the issue is whether industry and commerce are to be controlled exclusively by the operation of the spontaneous enterprise of independent business units or are to come under the regulation of organizations of business men exercising a general authority over special fields of business activity. It is not to be inferred that the activities of separate firms and corporations engaged in the same or similar lines of manufacture and commerce are wholly unrelated and anarchic even in the absence of trade associations. On the other hand, it is not intended to imply that the necessary alternative is the establishment of an intricate machinery for the minute and coercive management from a single source

of everything that pertains to the operation of vast and far-flung industries. The issue must not be conceived in terms of these formal extremes. The modern economic structure is far too complex to lend itself to these simple alternatives. The bitter struggle between the English Parliament, the guilds, and independent masters in various trades during the sixteenth, seventeenth, and eighteenth centuries, clearly illustrates the nature of the issue now once more joined. It is a question of more or less independent individualism, or more or less voluntary co-operation, or of more or less governmental regulation in the organization of industrial and commercial processes. The solution can be found only in a proper balancing of these various forces which together mould the character of the prevailing system of industrial control.

The traditional system of competitive business enterprise proceeded on the assumption that the adjustments of means to ends, of supply to demand—adjustments speculative in their very nature—could best be worked out by independent enterprisers, each volunteering to take the risks incident to the direction of productive processes on his own judgment and responsibility. The basic assumption underlying the institution and functioning of trade associations is that such adjustments can be made more effectively and in a more orderly fashion through some form of business co-operation. The whole truth is obviously not to be found in either theory. The history of economic progress provides sound justification for the maintenance of the competitive principle, but the concrete results of purely individualistic effort, under the complex conditions of modern industrial society, have demonstrated unmistakably the need of some measure of conscious regulation of the competitive process. This may be achieved through voluntary co-operative action, or it may be brought about by the authoritative action of government. Just how the compromise shall be effected, in just what proportion these various forces are to be relied upon in directing the modern industrial system, constitutes the practical and difficult problem which the following study is intended to clarify.

In Part I, against the background of a brief description of the course of trade association development from its incep-

tion, there is presented a survey of the evolution of anti-trust policy, particularly in the federal jurisdiction since the passage of the Sherman Act in 1890.

In Part II are set forth the lines of associated effort which are unqualifiedly prohibited under present law to trade organizations of any type.

In Part III are discussed seven different types of trade association activity which, according to the circumstances surrounding their practice and the intentions of the parties engaged in them, may or may not be lawfully pursued. The work of trade associations reviewed in these seven chapters raises incisive issues of public policy, and on the basis of economic analysis and of the interpretation of legal rules an attempt is then made to resolve these issues.

Part IV is devoted to an exposition of the major lines of association activity which are in their nature so clearly legitimate that they involve few questions of public policy. The purpose is to reveal more fully the sound and secure foundation for trade association effort in current industrial organization.

In conclusion, Part V attempts a general appraisal of the accomplishments of the trade association movement, its future prospects and the soundness of the existing policy of the law toward these instruments of business co-operation.

PART I: TRADE ASSOCIATIONS AND THE ANTI-TRUST LAWS

CHAPTER I

THE DEVELOPMENT OF TRADE ASSOCIATIONS

§1. The Nature of Trade Associations

A trade association may be defined as an organization for mutual benefit, composed of independent business concerns engaged in the same kind of industry or trade, and designed primarily to affect the conduct of that industry or trade.[1] The trade association as such is not engaged in the actual transaction of business for profit, nor does it represent a merger or consolidation of the associated business interests. Moreover, it differs from the less homogeneous associations of independent business units, such as chambers of commerce, general manufacturers' organizations, and similar groups, in that its membership is limited to participants in a particular line of manufacture or commerce, and its activities are restricted to the field of their primary interest. But trade associations may be federations of a number of trade organizations. These federations are of several types. They may consist of local or regional associations in the same industry or trade; they may be made up of associations in different but cognate branches of industry; they may comprise associations representative of successive stages of the producing and marketing process of particular trades. In all these cases the trade association is a composite unit, combining a number of smaller associations whose common business interests have led them to federate under a centralized control. As will become apparent in the course of this study, the

[1] The definition of trade associations formulated by the American Trade Association Executives reads: "A Trade Association is an organization of producers or distributors of a commodity or service upon a mutual basis for the purpose of promoting the business of their branch of industry and improving their service to the public through the compilation and distribution of information, the establishment of trade standards and the co-operative handling of problems common to the production or distribution of the commodity or service with which they are concerned." See Handbook, American Trade Association Executives, Chicago, 1924.

specific purposes of trade associations, whether organized as simple groups or as federated units, are diverse in scope, and their functions and activities are numerous and varied.

Two specialized forms of trade organization are deserving of particular mention. Perhaps the oldest type of association organized for a definitely limited purpose is the board of trade or the exchange.[1] These bodies are primarily organizations of active traders co-operating to furnish a common trading ground and to provide, according to established rules, a uniform method of making purchases and sales of standardized or graded commodities. In general, their effect is to facilitate the movement of the goods dealt in from their most economic sources into their most economic uses. But these associations, like other business organizations, are susceptible of abuse. Their rules and regulations with regard to market conduct may be made the vehicle of trade conspiracy and price manipulation. Like trade associations, they are generally lawful, in and of themselves, but their specific operations must frequently be subjected to close scrutiny.

Somewhat akin to the exchanges are the open price associations. They are likewise organized for the performance of a definite and restricted function, and this function is concerned largely with the mechanism of price determination. These open price associations are a more recent development than exchanges, and unlike exchanges, they are composed exclusively of sellers, usually manufacturers or jobbers. They are designed primarily to provide their members with comprehensive, accurate and immediate information of the market, in order to facilitate an intelligent adjustment of production and price policies. A bureau or central office is established by the association, to which prompt reports of production, goods on hand, quotations, prices, sales, and shipments are made by the members. These reports are then compiled and distributed, sometimes in conjunction with more general information relating to market conditions. While the material thus collected and disseminated is generally restricted to closed transactions, both the purpose and

[1] They are sometimes called chambers of commerce. For example, the Minneapolis Chamber of Commerce, incorporated in 1881, is a grain exchange.

effect of open price arrangements may have an intimate relationship to future policy. It is this relationship, as will appear subsequently, which constitutes the basic source of the legal difficulties encountered by open price associations.

§2. Their Beginnings

Trade associations as we now know them can be traced to the period of the Civil War. It became necessary, at that time, to take stock of the country's industrial assets in various lines, either upon a regional or upon an essentially national basis, and, as far as the temper and outlook of that generation permitted, to marshall these assets as a working whole for the accomplishment of a definite and vital objective. It was in these circumstances, largely, that American trade associations had their inception.[1] The severe conditions of trade experienced in most markets during the early years of the reconstruction period do not appear to have been favorable to the organization of trade associations. The record of the years of depression following the panic of 1873 likewise discloses but meager activity in the formation of trade associations.[2] In the two years of prosperity preceding the panic, on the other hand, several important national

[1] Some associations date their establishment prior to the Civil War. The National Cotton Manufacturers' Association, for example, traces its existence to 1854. It is true that the Hampden County Cotton Spinners' Association, a purely local organization, was founded in 1854; but the real nucleus of the National Cotton Manufacturers' Association was the New England Cotton Manufacturers' Association, which was not formed until 1866. See Report No. 1, of the New England Cotton Manufacturers' Association, Boston, 1872.

[2] In an article on the "History of Trade Associations in America" by Emmett Hay Naylor, of the Writing Paper Manufacturers' Association, printed as Appendix A in "Trade Association Activities," Department of Commerce, 1923, pp. 301–307, the author says (p. 304): "The reconstruction period immediately following the Civil War, the panics of 1873, 1893, and 1907, and then the conditions surrounding the World War, made it necessary for business to organize as a matter of mutual protection." There follows (pp. 305–307) a tabulation of "typical examples of organization of trade associations according to business cycles" designed to illustrate these influences. The tabulation is admittedly incomplete. The facts do not appear to justify the implication that the greatest activity in the organization of trade associations is to be found in periods of depression, nor the apparent conclusion that trade associations have been uniformly organized "as a matter of mutual protection." The trade association movement, like the movement toward industrial consolidation, appears to have received its chief impetus under the influence of prosperous conditions and profit-making opportunities; and in recent years there has been repeated "recognition of the necessity of constructive development of an industry through co-operative effort."

associations were organized;[1] and during the period of increasing business activity which marked the decade from the end of the seventies to the end of the eighties numerous trade associations had their beginning, of which about a score of the more prominent have survived.[2] It appears that the early trade associations were more in the nature of offensive than of defensive organizations. They seem to have been formed for the purpose of enabling their members more effectively to take advantage of favorable business conditions, rather than as a means of safeguarding the trade against wasteful, demoralizing, and ruinous practices, or of striving for constructive achievement through co-operative action. These circumstances help to explain certain features of early trade association activities, and to account for the desultory appearance and disappearance of many of these organizations in various fields from the period of the Civil War up to about 1890. The nature of these early purposes, methods, and difficulties has been aptly described as follows:

> "It is at once interesting and amusing to read over the original by-laws and records of early meetings of [the] . . . pioneer associations. . . It is against all natural laws of commerce, against the nemesic law of supply and demand, against the best dictates of human nature itself, to fix prices, limit production, and divide territory, and yet that is exactly what the early trade associations tried to do. . . And so the records of these old trade associations are replete with the agonies of evolution; they would all agree to something that might work a few weeks, then some one would forget and do differently, a wail would go up, the agreement fly to pieces, the association would gasp and die or go to sleep for a number of months until the storm of wrath had passed. Then the members with suspicion and hope would foregather once more and do it all over again. . . ."[3]

A brief recital of the history, during this early period, of a trade association in one branch of manufacturing industry which has been the subject of special investigation may serve

[1] Among the trade associations organized in the year 1872 were the following; National Association of Stove Manufacturers, Carriage Builders' National Association, Silk Association of America.

[2] See list of representative trade associations arranged chronologically according to date of organization in Appendix B of this volume.

[3] Emmett Hay Naylor, "History of Trade Associations in America," printed as Appendix A to "Trade Association Activities," Department of Commerce, 1923, pp. 303–304.

to illustrate some of the foregoing characteristics and prove enlightening.[1] The farm machinery industry appears to have been wholly unorganized prior to 1879. In that year a group of manufacturers of farm wagons came together to organize the National Wagon Manufacturers' Association. The first meeting appears to have been chiefly occupied with a plan for a general increase of prices. In subsequent meetings further recommendation of price advances were made, but experience soon taught that it was one thing to formulate such a policy and another thing to put it into effect. New manufacturers were continually entering the field and lack of harmony among the members prevented any consistent unity of action. Interest in the association seems to have waned for a time but was revived in 1886 and 1887 by an attempt to organize a pool. There was to have been a curtailment of production and an allotment of output, with penalties for production in excess of stipulated amounts. But the difficulty of adjusting quotas upon unstandardized products appears to have presented an insurmountable obstacle to the execution of the scheme. The negotiations continuing over several years were fruitless, and when the general meeting of the association was convened in 1891, the members were ready for a new orientation of association policy. But even during the first twelve hectic years of the existence of the association, its efforts had not been directed exclusively toward price-fixing and output limitation. The members had discussed terms of sale (i. e., credit terms), standardization of products, modification of warranties habitually given to customers, and related matters. Policies of this nature became thenceforth the characteristic burden of the association program. As in the case of numerous other trade associations, the year 1890, or thereabout, seems to have marked a turning point in the history of the organization.

§3. The Formative Stage of Their Development

The period from 1890 to the advent of open price arrangements in 1911 may be referred to as the second stage in the

[1] "Farm Machinery Trade Associations," Department of Commerce, Washington, 1915.

development of trade associations. The period of "growing pains" had been concluded, and the movement entered upon its formative stage. Trade associations began to assume the dignity of definite business institutions. From about 1890 onward many associations in different industries and in different sections of the country met regularly in annual conventions, maintained permanent offices, and enjoyed a continuous existence through elected officials. The proceedings were normally open and above-board. Election to office became an honor to be published, rather than a secret to be hidden; indeed, in some instances the social features of the association seem to have been the main binding element. It was no longer impossible to distinguish between legitimate trade associations and illegal pooling arrangements. It is true, of course, that during the two decades of this period a number of associations were charged with unlawful schemes and practices for controlling the market.[1] But the scope of the legitimate activities of these bodies became so broad, and the persistence and growth of those associations which adhered to such legitimate activities became so striking, that all serious doubt was removed as to what policies were normal and typical, and what policies were abnormal and exceptional, in the functioning of trade associations. The passage of the Sherman Anti-Trust Act in 1890 doubtless contributed toward this marked change of emphasis. The clear prohibition of the practices which had characterized many of the early associations, coupled with the fact that the shift in the general character of association work synchronized with the enactment of the statute, suggests that a positive influence may have been exercised by the federal anti-trust law in moulding the direction of trade association activity. It would be hardy to assume, however, that the change of

[1] *U. S. v. Jellico Mountain Coke and Coal Co.*, 46 Fed. 432 (1891); *Lowry v. Tile, Mantel & Grate Association*, 98 Fed. 817 (1899), 193 U. S. 38 (1904); *U. S. v. Coal Dealers' Association*, 85 Fed. 252 (1898); *U. S. v. Chesapeake & Ohio Coal Co.*, 105 Fed. 93 (1900); *Gibbs v. McNeely*, 118 Fed. 120 (1902); *Cravens v. Carter-Crume Co.*, 92 Fed. 479 (1899); *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211 (1899); *U. S. v. General Paper Co.*, Decrees and Judgments in Anti-Trust Cases, 75 (1906); *Wheeler-Stenzel Co. v. National Glass Jobbers' Association*, 152 Fed. 864 (1907). This list includes only such trade associations and pools as were brought before the courts. There were doubtless others of the same character. See, for example, the allegations of the Bureau of Corporations in its Report on "The Lumber Industry," Washington, 1914, Part IV, Introduction, and *passim*.

emphasis was the result solely of external pressure. The influence of the Sherman Act must be discounted, in some measure, because of the generally prevailing impression of its innocuousness during the first decade following its enactment. And the forces at work within the trade association movement itself must not be overlooked. Because of the repeated demonstration of the practical futility of much of the early effort along restrictive lines, and because the value of co-operation in constructive channels became more and more apparent, these internal forces were spontaneously remoulding the association movement.

The course of trade association development during this period can be illustrated concretely by tracing the history of co-operative organization in the lumber industry.[1] Even prior to 1890 there were a number of local and regional associations of lumber mill operators. These were almost invariably organized on state lines. One of the earliest general sectional associations appears to have been the Southern Lumber Manufacturers' Association, formed in 1890 out of several state associations.[2] In 1906 its name was changed to the Yellow Pine Manufacturers' Association; and at the same time eligibility to membership was changed from a territorial basis to a trade basis, being confined or extended, as the case might be, to all manufacturers of yellow pine. From its inception this association engaged in two distinct lines of work. In the first place, it undertook the standardization, with respect both to grades and dimensions, of saw-mill products. To promote and facilitate this standardization activity, it established a general inspection service at wholesale markets.[3] This policy, together with its furtherance of commercial arbitration in conjunction with the National Wholesale Lumber Dealers' Association has been of inestimable benefit to the lumber trade. Its second line of work, on the other hand, was restrictive in

[1] The Bureau of Corporations published a general history of lumber trade associations in "The Lumber Industry," 1914, Part IV. This study has been supplemented by investigations of the Federal Trade Commission covering more recent experience. See "Lumber Manufacturers' Trade Associations," 1922.

[2] "The Lumber Industry," Bureau of Corporations, Washington, 1914, Part IV, p. 75.

[3] *Ibid.*, pp. 6–10.

character. While the association appears to have adopted no compulsory tactics for the maintenance of prices, it freely engaged in organized efforts designed to encourage members to achieve such maintenance of prices. In times of market slump, moreover, express agreements were effected in association meetings for the curtailment of mill operations.[1] The records of the association disclose that, beginning with the year 1894, fifty-two "official price lists" were adopted down to December, 1905.[2] About that time, upon the advice of counsel, this practice was abandoned; but in its stead "market reports" were compiled and distributed by the secretary, or by "inspired" publishing concerns.[3] That the purpose and effect of these "market reports" were similar to those of the "official price lists" was established in the Missouri ouster suit, begun in 1909, against members of the association doing business in that state.[4] The adverse judgment in this prosecution, rendered in 1914, was followed shortly by a complete reorganization of the association. The provision of the new constitution indicated the purpose of the association to direct its activities in future along clearly lawful channels. A new name was adopted to distinguish it from the outlawed association, and it has since been known as the Southern Pine Association.

In the meantime trade associations in other branches of the lumber industry, in various parts of the country, had been

[1] The following is an excerpt from the presidential address of R. A. Long, at the January, 1905, meeting in New Orleans: . . . "at our semi-annual meeting in June, a resolution was passed looking to the reduction of our output about 33 per cent. Some of the most successful men in our line of business shook their heads and made the statement that we could not 'legislate prices'; that supply and demand must govern. . . . In spite of these prophecies we succeeded in securing the co-operation of about 80 per cent of the manufacturers of yellow pine, and so the plan was entered into and tested between July 1 and October 1. In less than ten days from July 1, the downward tendency of prices had been checked, and within thirty days a substantial advance had been made. Before we had reached October 1 it was believed that the commencing of the operation of our mills on full time on that date would practically mean a loss of all we had gained, and an effort was made, and accomplished, continuing the curtailment until January 1 of this year. On October 15 a further notable advance was made. [Replies to inquiries sent out by him indicated] an average advance between July 1 and October 1 of $1.19 per M, and between October 1 and January 1 of $1.04 per M, all agreeing that the curtail movement was that which brought about this favorable condition." Quoted in "The Lumber Industry," Bureau of Corporations, Washington, 1914, Part IV, p. 76.

[2] *Ibid.*, p. 80.

[3] *Ibid.*, pp. 15, 79–106.

[4] "Lumber Manufacturers' Trade Associations," Federal Trade Commission, Washington, 1922, p. 10.

organized and were developing along substantially similar lines. The need of a national organization to co-ordinate the work of the several associations and to provide a single medium for the expression of trade opinion with regard to governmental policies affecting the lumber interests as a whole, led to the formation, in 1902, of the National Lumber Manufacturers' Association.[1] The work of the national body has been kept scrupulously free from price manipulation. Its main energies have been directed to three spheres of activity. It has organized and conducted a capital and credit rating bureau and collection service of nation-wide scope and of exceptional efficiency.[2] The protection afforded the trade in credit transactions has unquestionably been greater than could be secured through reliance upon the general mercantile agencies. In the second place, the statistical department maintained by the national association has performed a very useful function in compiling data upon the capacity, the cut, and the shipments of mills operating in specified regions and upon specified kinds of timber.[3] Finally, in the field of publicity, the association has done much to educate the consuming public in the advantages of wood and to protect the industry against the inroads of alternative building material upon its largest market. Incidentally, the association has at various times exerted considerable influence on the enactment and enforcement of public policies affecting the lumber industry.[4]

The course of trade association development, between 1890 and 1911, in the lumber industry, as described in the foregoing survey, was not exactly paralleled in any other single industry. Needs emerge at different times in different trades, and the reaction to these needs of business men in different lines is not always identical. But the experience of the lumber trade is believed, nevertheless, to be fairly typical. This period saw the gradual abandonment, or at least a

[1] "The Lumber Industry," *op. cit.*, pp. 51–55. One of the organizing members expressed himself as follows at the initial meeting: "Our local organizations have now expanded until almost the entire territory is covered; in some cases I believe the territory of one association overlapping that of another, with a consequent confusion of prices, grades of lumber, and manufacture, which has threatened even to rival that historic mix-up at Babel."

[2] *Ibid.*, p. 54. [3] *Ibid.*, p. 55. [4] *Ibid.*, pp. 63–70.

modification in form, of coercive efforts to control production and prices through trade association activity. It also witnessed the growth of association functions of a more desirable character. Standardization of products, reduction of litigation, interchange of credit information, compilation of production statistics, stimulation of demand for particular materials or commodities, encouragement of favorable legislation —these are typical of the widening range of interest and effort among trade associations and their members.

§4. The Concept of Co-operative Competition and the Prevailing Activities of Trade Associations

The growth of these less obnoxious, and even meritorious, co-operative policies helped to allay popular suspicion and to disarm legal criticism of trade associations. But these business confederations were not prepared to abandon entirely their attention to prices and to market conditions. Originally, as we have seen, these matters had been largely instrumental in bringing trade associations into being, and the impetus to concerted control of market conduct was still strong. Yet the danger of running afoul of the law through this type of association activity was becoming increasingly manifest. The "Big Stick" of President Roosevelt and his successor had grown to be a menacing weapon. At this juncture, therefore, a new conception emerged of the sphere and manner of functioning of trade organizations. It sought to reconcile the negative attitude of the law and the positive demands of business enterprise. It was termed "co-operative competition." The new idea manifested itself, for the most part, through the re-formation of many of the old groups, and the establishment of new organizations, along the lines of so-called open-price associations, and through an increased emphasis upon co-operation for efficiency.

While trade associations entered upon a new phase with the advent of this conception in 1911, the discovery of a technique for "co-operative competition" was a symptom rather than a cause of the transformation which took place. The pressure of underlying forces was pointing toward closer and more comprehensive organization in all branches

of industry. As the country was approaching a more or less stabilized economic basis, business concerns could no longer rely primarily on the expanding market afforded by rapidly increasing population and new discoveries of natural resources. Business men found themselves compelled to adjust their activities—to co-ordinate their production and sales policies—more intelligently and more accurately, on the basis of the best technical practice and the actual conditions of the market. It became necessary to confine guess-work, rule-of-thumb and muddling within narrower and narrower compass, and to substitute therefor reliable information, sound principle, and conscious direction, in the functioning of business enterprise. And co-operative action was visualized as the most effective tool for the achievement of this end. Its advantages appeared to be especially promising for the development of more orderly price policy, more efficient productive activity, and more harmonious labor relationships.

(*a*) *Open-Price Policy*

The benefits to be derived from the stabilization of prices (which cannot be fully realized without making manufacturing and marketing policies more orderly and less spasmodic, more intelligent and less impulsive) could not be gainsaid. It was felt that a sounder growth and a smoother functioning of the industrial organism could be induced and, perhaps, could only be induced, by a "regulated diet." Accordingly, from the very outset, the open-price plan was warmly embraced by a great body of distressed business men as "a way out" of the rough region of high peaks and deep valleys of business activity. The basic idea of the open-price plan was to provide, through associated action, for the interchange of business information among competitors in the same line of trade or industry, in order that production and price policies, though ultimately determined by the independent action of each concern or enterprise, might be adjusted "openly" and "intelligently."[1]

[1] Milton Nels Nelson, in his valuable monograph on "Open Price Associations," Urbana, Ill., 1922, traces, as follows, the chain of reasoning by which the doctrine that "knowledge is the essence of competition" is supported: "A knowledge on the part of sellers and buyers of their own interest, implying, as it does, a knowledge of all

The business facts interchanged under the open-price plan have varied from time to time and from industry to industry. Originally, as applied chiefly to manufacturers producing goods to order, the members of the open-price associations were required to file reports of inquiries, bids, and contracts. As these organizations developed, and particularly as applied to manufacturers selling goods to jobbers and retailers, the scope of the information required by the various reporting systems was much broadened. At one time or other, the important business facts interchanged have included quotations, prices, orders, shipments, purchases, production, manufacturing and selling costs, and stocks on hand.

It was not the avowed purpose of the open-price plan to resort to concerted action in fixing prices or in regulating output. Past prices, not future prices, ascertained costs, not agreed costs, were to constitute the subject-matter of cooperation. The sponsors of the open-price movement merely contended that an approximation to that "perfect knowledge of the market" which is assumed by economists as the mainspring of the competitive adjustment of industrial action is a requirement of stable and prosperous business conditions. In the united efforts to make this knowledge available they saw nothing but a preparation for the exercise of independent judgment and the pursuit of independent policy. The legal pitfalls into which the new gospel led trade associations and their members will be examined in due course. Here it need only be noted that before the prosecutions of the Department of Justice had dispelled the vision, trade after trade embarked upon this line of activity. Numerous branches of the steel industry were among the first to or-

conditions that might have a bearing on the supply of, and the demand for, a given commodity, together with the ability and willingness to intelligently act thereon, would result, according to the law of supply and demand, in similar exchanges taking place on similar terms, or to state it in terms of price, it would result in the naming of an equilibrium price 'for the same unit of the same quality of the same article in the same market.' This stability of market conditions, which finds expression in a single price, will ensue only under the conditions named. It is attainable only in theory. But such stability can be approximated by means of systematic efforts put forth to eradicate sources of friction. Undoubtedly one of the most serious sources of friction is due to sellers and buyers lacking adequate knowledge," p. 45. It is to be noted that the knowledge contemplated by the open-price plan is made available only to sellers. See, also, Arthur J. Eddy, "The New Competition," New York, 1912, p. 82. Mr. Eddy appears to have been the originator of the idea of open-price determination.

ganize open-price bureaus or exchanges. Among the pioneers were the Bridge Builders' Society, in 1911, and the Manganese Steel Founders' Society, in 1913. In the lumber industry so-called "Information Bureaus" were established in 1912, or shortly prior, by the West Coast Lumbermen's Association, Western Pine Manufacturers' Association, and the Yellow Pine Association. The National Association of Finishers of Cotton Fabrics, formed in 1914, extended the open-price practice to one branch of the textile industry. Thence it soon spread to other branches, including hosiery and knit goods. The movement, in a large variety of industrial fields, was accelerated during the period of the war. The development of open-price policy came to a standstill only after the recent adverse decisions of the United States Supreme Court.[1]

(*b*) *Stimulation of Economic Efficiency*

That increased attention to questions of efficiency in production and economy in distribution should also characterize the new program of trade association work is not surprising. The profit motive, as well as the pressure of changing economic conditions, served to stimulate emphasis upon cooperation for efficiency. In default of legitimate opportunity to raise prices through concerted effort, it was only natural that joint action should be utilized to reduce costs. The savings resulting from increased efficiency could not but inure to the advantage of the whole trade. The benefits of technical and administrative improvements in the manufacturing and marketing processes will not invariably be transmitted directly to consumers even under perfectly competitive conditions. They tend to radiate gradually from the point of origin, reaching their destination, the

[1] *American Column & Lumber Co. v. U. S.*, 257 U. S. 377 (1921); *U. S. v. American Linseed Oil Co.*, 262 U. S. 371 (1923). For a discussion of the prevalence of open-price associations in various industries, and their distribution among manufacturers, wholesalers and retailers, see Milton Nels Nelson, "Open Price Associations," *op. cit.*, pp. 10–18; for a consideration of their historic origins, see *ibid.*, pp. 24–28. See also, *ibid.*, Appendix, Exhibit I (pp. 207–210), giving a list of 117 associations reputed to be doing open-price work; Exhibit II (pp. 211–213), giving the minutes of a meeting of the American Hardwood Manufacturers' Association; Exhibit III (pp. 214–219), giving the constitution and by-laws of a typical open-price association; and Exhibits IV–XIV (pp. 220–230), reproducing a variety of reporting forms.

ultimate consumer, after the lapse of considerable time and the enrichment of numerous intermediaries by the way. Until productive facilities in the industry have been adjusted to the new conditions, both technical and administrative improvements will yield a differential advantage to their originators. They will be the temporary recipients of a margin above the cost of production, the extent of which will depend upon the nature of the improvements, the adequacy and flexibility of the productive equipment utilized, and the character of the demand for the product. Ultimately, however, the competitive process will tend to reduce prices to the new cost of production, to the distinct advantage of the consuming public, and to the permanent benefit of the trade as a whole in its struggle for business with producers of alternative commodities. In the light of these circumstances, the recent period of trade association development saw the emergence and increasing utilization of numerous co-operative activities designed to stimulate efficiency in productive and distributive processes.

Mutually supported commercial and industrial research—dealing, on the one hand, with business facts, and on the other, with technical processes—constitutes one of the most important of these constructive activities.[1] Business practice is not always uniform within any particular domain of trade. For example, each individual enterprise ordinarily selects, or perhaps accepts on the basis of tradition, some special method of distributing its goods. Attention is then directed primarily to the achievement of efficiency within the lines of its established practice. It has little opportunity, even were the inclination present, to test or compare the advantages of alternative marketing methods. The advantages of alternative methods can be ascertained only through deliberate variation in practice, and experimentation, always costly, is especially unsettling in commercial relations and immediately burdensome in its effects.

The trade association appears to be the obviously practical medium for probing the possibilities of improvement in

[1] See "Trade Association Activities," Department of Commerce, Washington, 1923, pp. 164–191; Franklin D. Jones, "Trade Association Activities and the Law," New York, 1922, pp. 103–126.

marketing methods and in general business practice. It affords a natural channel for the compilation of business information in its particular field. The concrete facts concerning economic conditions and commercial practice in any given industry are easily and continuously available to the trade association representing that industry, and the principles of business conduct that may be properly deduced from the collective experience of the membership can be made readily available to the entire trade or industry.[1] Indeed, it is of the very essence of a trade association that it shall serve as a clearing-house of information touching the organization, functioning, and economic status of the business units composing it. There has been a growing recognition of the great utility of such commercial research in furthering economies in business administration, and a rapid development of trade association activity in this direction.

Joint industrial research—scientific investigation of technical processes on some co-operative basis—has been recognized as an even more fundamental source of productive efficiency. This activity was entered upon early in some trades and has grown more rapidly than commercial research.[2] While individual enterprises frequently maintain research laboratories, research problems can often be effectively studied through co-operative action. The small and moderate-sized manufacturing establishments are not in a position to bear the financial burden involved in independent research activity; and even the larger industrial organizations have sometimes recognized that the great expense of the enormous amount of fruitless effort which must ever attend research activity favors common participation by all who might immediately or eventually reap substantial benefit from its occasional fruit. Accordingly, not only have association laboratories been set up in several industries, but in order

[1] This is not to overlook the fact that the research activity of a single trade association operates in a restricted sphere and tends only indirectly and incidentally to promote the socially best system of distribution in the entire line from producer to consumer. The trade association point of view is limited to that of a special group, and there is still place for collective action embracing the interests of the whole community.

[2] "A recent survey indicates that approximately 70 trade associations are concentrating upon industrial research and are investing sums up to $100,000 annually." Richard Arnold May, "The Trade Association and its Place in the Business Fabric," *Harvard Business Review*, Vol. II, No. 1, October, 1923, p. 87.

that the co-operative principle might be carried as far as possible, trade associations have frequently established research relationships with government departments and with educational institutions.

The results of industrial research, as thus undertaken, do not merely lead to new devices and improved processes; they render possible a more efficient and more orderly adjustment of existing practice to new technical developments. The same scientific approach which is applied to the discovery of new devices and new methods has been profitably employed in the adaptation of the old and established practices and processes to these new methods and devices. The adjustment of standard specifications for raw materials to the shifting requirements of constantly improving plant equipment, conveyor machinery, and the like, provides an important illustration of this line of effort. And the establishment of finished product standards, not merely of composition, dimension, style, and quality, but even of packing and packaging, suitable to the requirements of improved transportation and storage facilities, and to the widening demand of national and international markets, further illustrates the influence of associated research undertakings, along commercial as well as industrial lines. Simplification and standardization activities, partly based upon the general experience of the co-operating association membership, and partly grounded in organized research, possess vast potentialities for eliminating economic waste and stimulating efficiency in the functioning of commercial and industrial enterprise.[1]

Trade associations have developed numerous other activities designed to increase productive and distributive efficiency.[2] These activities almost invariably spring from the fact that the trade association, through its individual members as well as through its central organization, is in possession of a fund of information and experience touching the

[1] "It has been estimated that the adoption of dimensional standards in the automobile industry, for instance, entailed a saving of $750,000,000 in 1920 alone." *Harvard Business Review, op. cit.*, p. 88.

[2] See "Trade Association Activities," Department of Commerce, Washington, 1923; Franklin D. Jones, "Trade Association Activities and the Law," New York, 1922.

industry or trade involved, and is in a position, because it normally represents a large proportion of the business interests concerned, to eliminate acknowledged abuses and to introduce constructive reforms. The results of this information and experience are not merely compiled and disseminated, as in the case of general statistical services or of the special arrangements calculated to stabilize production and price policies, but are utilized by the association as a basis for the joint establishment of specific lines of conduct deemed beneficial to the trade as a whole. It is sufficient, at this point, merely to indicate the general character of these activities.

Standard cost accounting systems have been formulated and adopted, as a means of inducing greater economy in productive processes and more intelligent administration of business enterprises. The adoption of uniform contract forms has been stimulated, in order that business dealings might be rendered more certain. The establishment of credit bureaus and, in some instances, of collection services, has served to supplement, in effective and intimate fashion, the functions performed by general credit agencies, by seeking to reduce to a minimum the demoralization and losses resulting from unsound extension of credit. Co-operative insurance arrangements have been widely developed for the reduction of hazards and of the cost of insurance protection. Joint advertising campaigns have been conducted, and common trade labels have been adopted, for the purpose of stimulating and stabilizing demand. Patents have been pooled and interchanged, as a means of rendering the benefits of technical invention more widely available, to the trade as a whole and to the general public. Arbitration machinery has been organized for the settlement of trade disagreements, in order that the embarrassment and delay and expense commonly incident to the litigation of business controversies might, as far as possible, be minimized. Through the organization of traffic bureaus and otherwise, valuable assistance has been rendered to association members in transportation matters—in the adjustment of rates and classifications, in the auditing of freight bills, in securing adequate car supplies, in improving shipping methods and in general dealings with regulatory

agencies. Co-operative efforts in the negotiation of purchases have frequently effected greater economy and stability in production. The formulation and enforcement of codes of ethics affecting business conduct have helped to eliminate wasteful as well as unfair competitive practices, and to raise the general plane or level of the competitive process. Unified and responsible representation of particular trades or industries in matters involving public policy and governmental action has aimed to mould the legal environment of business conduct along stable and realistic lines, to the ultimate advantage of the general community as well as of the particular interests involved.

In essence, all of these activities are directed, more or less immediately, to the achievement of increased efficiency in manufacturing and marketing processes. They may be, and in practice generally have been, conducted without undue interference with the competitive organization and control of industrial action and the free functioning of individual initiative. They have been developed largely in the course of the past dozen years by way of concrete fulfilment of the new program of "co-operative competition." It is obvious, however, that such co-operative efforts are subject to abuse, and the facts of trade association development in particular fields disclose such abuse in not a few instances. In subsequent discussion of the legality of these varied activities, an attempt will be made to distinguish between the legitimate exercise of these functions and their utilization in suppressing competitive conditions.

(*c*) *Adjustment of Labor Relationships*

A third element in the new orientation of trade association policy was reflected in the building up of a program and a technique for dealing collectively with labor. The doctrine that the unionization of labor imposed upon employers the necessity of forming co-extensive organizations as capable of marshalling their forces for effective bargaining as the national and international unions, was not new.[1] The first national trade agreement had been negoti-

[1] C. E. Bonnett, "Employers' Associations in the United States," New York, 1922, pp. 3–33.

ated a full two decades earlier.[1] But the rapid extension of labor organization from 1902 to 1905, and again after 1910, clearly suggested the development of collective agencies on the side of employers. They, too, had common interests in the wage agreement which might be effectively conserved through co-operative effort. Accordingly, numerous distinct employers' associations were organized, and trade association activities were widely extended to the field of labor relationships. The usefulness of trade associations in exercising responsibility in collective bargaining and in organizing resistance to recurrent strike movements, has often been questioned. But in several industries the trade organization has been made the medium of co-operation for educating members in the methods of employee welfare work, and for comparative studies in the effectiveness of various methods. The full attainment of the potential economies inherent in the cultivation of a broad spirit of co-operation between laborer and employer in any branch of industry would seem to be dependent upon mutual efforts to that end; and the trade association is an obvious instrument for promoting this co-operative spirit on the part of employers. Discussion and experimentation along these lines had achieved considerable progress before 1911, but from that time forward increased activity became apparent. This activity has manifested itself in many ways. Systems of employee-training have been worked out and established. Assistance has been rendered in the organization of employees' mutual benefit societies. Investigation and research has been furthered in the field of employment psychology. Co-operative insurance against industrial accidents and trade diseases has been stimulated. All of these and similar activities have been developed in some measure; some of them have been brought to a high degree of usefulness.

§5. The Influence of the War and Its Aftermath

In addition to the pressure of these general economic conditions upon the development of trade associations and their

[1] In 1891, in the foundry trade. See J. R. Commons and Associates, "History of Labor in the United States," New York, 1918, Vol. II, p. 480.

activities, the special circumstances of the war and its aftermath exercised a powerful influence upon this development. Even prior to our own participation, the European war imposed extraordinary demands upon American industry, and the increased strain upon all primary markets led to a new emphasis upon quantity production and acted as a forcing process upon the association movement. After our entrance into the struggle, the demand for production in certain lines became unprecedentedly great and insistent. How to curtail the production of "non-essential" commodities, how to stimulate maximum productive activity in special fields, and how to secure, without paying exorbitant prices, such portions of the total output as were deemed necessary for the effective prosecution of the war effort were among the major problems of governmental policy. The disorganizing influence and costliness of the efforts of the Allied governments, during the early years of the war, to satisfy their requirements of needed supplies by competitive bidding in the general market, as private parties, were observed with considerable dismay by the American authorities. It was recognized, on the other hand, that the federal governmental machinery was entirely inadequate to assume the responsible management, or even a close technical supervision, of vast industrial enterprises, reaching in many instances across the continent. Accordingly, while primary reliance continued to be placed, for the most part, upon private initiative, the Government undertook to deal in respect to many matters, not with individual business concerns, but with entire trades and industries. For this purpose the trade association was found to be the simplest and most effective instrumentality. As a result of this governmental policy of working through trade associations in dealing with such problems as supply rationing, for example, many of the existing organizations were greatly strengthened and new associations were brought into being. The experience of the war was reflected, also, in the post-war period. The advantages of co-operation on the technical side had been amply demonstrated, and the possibilities of co-operation on the market side promised equally gratifying results. Moreover, the process of inflation which continued in this country for about two years after the cessation of

hostilities afforded a propitious situation for joint restriction of output, of which advantage was taken in some instances. The very extent and rapidity of the rise in the general price level tended to obscure the effect of concerted market operations in special lines. As a result of these circumstances, and by virtue of the impetus gained by the association movement during the preceding decade, another great addition to the ranks of trade associations occurred during these post-war years.[1] The current uneasiness of trade associations is in no small measure traceable to the prevailing governmental attitude toward them. This seems to have been reflected in their rate of growth, though the apparent retardation of their development may be attributable in some degree to the gradual filling up of the field.

§6. The Influence of Governmental Policy

The conduct of many of these organizations has been subjected to investigation and complaint by the Federal Trade Commission[2] and to prosecution by the Department of Jus-

[1] For an estimate of the extent of trade association organization, and for a list of representative trade associations arranged chronologically, according to date of organization, see Appendix A and Appendix B.

[2] The following reports of investigations by the Federal Trade Commission involved a consideration of trade associations and their activities: "The Book Paper Industry," Aug. 21, 1917; "Causes of High Prices of Farm Implements," May 4, 1920; "The Grain Trade," Vol. V (Future Trading Operations in Grain), Jan. 12, 1921; "Commercial Feeds, Summary," April 20, 1921; "Prices of Tobacco Products," Feb. 18, 1922; "Lumber Manufacturers' Trade Associations," June 24, 1922; "Methods and Operations of Grain Exporters," Vol. I (Interrelations and Profits), Oct. 21, 1922; "Preliminary Report on the Cotton Trade," Feb. 26, 1923; "House Furnishings Industry," Vol. I (Household Furniture), May 26, 1923; "Western Red Cedar Association," Feb. 26, 1923; "Northern Hemlock and Hardwood Manufacturers' Association," May 7, 1923. See, also, Annual Reports of Federal Trade Commission for year ended June 30, 1917, pp. 14, 15, 18; for year ended June 30, 1919, p. 37; for year ended June 30, 1920, pp. 35, 36; for year ended June 30, 1922, pp. 41–42, 49–50, 62–63, 72, 73; for year ended June 30, 1923, pp. 75–76. The proceedings against the following trade associations are among the more important complaints brought by the Federal Trade Commission under Section 5 of the Trade Commission Act: Bureau of Statistics of Book Paper Manufacturers, 1 F. T. C. Dec. 38 (1917); Association of Flag Manufacturers of America, 1 F. T. C. Dec. 55 (1918); U. S. Gold Leaf Manufacturers' Association, 1 F. T. C. Dec. 173 (1918); National Harness Manufacturers' Association, 1 F. T. C. Dec. 335 (1919); Wholesale Grocers' Association of El Paso, 3 F. T. C. Dec. 109 (1920); Atlanta Wholesale Grocers, 4 F. T. C. Dec. 466 (1922); American Dental Trade Dealers' Association, 4 F. T. C. Dec. 484 (1922); Southern Hardware Jobbers' Assn., 4 F. T. C. Dec. 428 (1922); United Typothetæ of America, Complaint No. 459, decided Aug. 17, 1923.

tice.[1] Adverse judgments by the United States Supreme Court and restrictive decrees promulgated by the lower federal courts, at the instance of the prosecuting officers of the government and frequently with the consent of the defendants, have served to impose a serious damper on the association movement and to throw doubt on the legality of some of the basic trade association functions.[2]

But the attitude of the government has not been wholly and persistently repressive. Fundamental conflicts of opinion within the various departments of government have been progressively disclosed. The most notorious of these rifts in governmental policy was that exhibited in the correspondence between Secretary Hoover and Attorney-General Daugherty early in 1922.[3] The Secretary of Commerce was somewhat perturbed by the interference of the Department of Justice with his program for organizing American industry and making it articulate in a more representative way in national counsels, and he must have experienced little satisfaction in the Attorney-General's tentative and indefinite pronouncements upon the lawful sphere of trade association activity. The chief outcome of the Attorney-General's response to the inquiries of the Secretary of Commerce concerning the "legitimate co-operative activities" of "legitimate trade associations" was to create a sense of uncertainty and distrust in the minds of trade association executives. This disturbed state of mind was accentuated,

[1] See List of Cases Instituted by the United States under the Federal Anti-Trust Laws, Department of Justice, Washington, December 15, 1923: *U. S. v. National Retail Monument Dealers' Association* (1917), p. 118; *U. S. v. Philadelphia Tile, Mantel, and Grate Association* (1917), p. 122; *U. S. v. Cement Manufacturers' Protective Association* (1919), p. 127; *U. S. v. American Association of Wholesale Opticians* (1919), p. 128; *U. S. v. Barbers' Supply Dealers' Association* (1920), p. 130; *U. S. v. Poster Advertising Association* (1921), p. 135; *U. S. v. Corrugated Paper Manufacturers' Association* (1921), p. 136; *U. S. v. Southern Pine Association* (1921), p. 136; *U. S. v. National Terra Cotta Society* (1922), p. 150; *U. S. v. Tile Manufacturers' Credit Association* (1922), p. 146; *U. S. v. Fur Dressers' and Fur Dyers' Association* (1922), p. 153; *U. S. v. Gypsum Industries Association* (1923), p. 154; *U. S. v. National Association of Window Glass Manufacturers* (1923), p. 155; *U. S. v. Maple Flooring Manufacturers' Association* (1923), p. 156.

[2] *American Column & Lumber Co. v. U. S.*, 257 U. S. 377 (1921); *U. S. v. American Linseed Oil Co., 262 U. S.* 371 (1923); *U. S. v. Tile Manufacturers' Credit Association*, U. S. District Court, Southern District of Ohio. In Equity, No. 201. Final Decree, Nov. 26, 1923.

[3] Correspondence between Department of Commerce and Department of Justice upon the Activities of Trade Associations, February 3, 8, and 9, 1922.

toward the end of 1923, by the further interchange of views between the two departments concerning "the right of trade associations to gather and distribute information and statistics."[1] The anxiety of trade associations and of their responsible officials was enhanced rather than mitigated by the dicta of the Attorney-General that even "general information as to the conditions" of an industry "should be distributed strictly through a responsible medium" like the Department of Commerce, and that there is "no objection to its being gathered by an association provided it be strictly guarded and the association be prohibited from distributing it among its membership."

A sharp and vital divergence of policy has also been disclosed, from time to time, between several of the technical branches of the government service and the legal departments. A number of the federal bureaus have at one time or another made to the industries which they serve suggestions or even recommendations quite inconsistent with the general tenor of interpretation of the anti-trust laws, as applied to trade co-operation, adopted by the Department of Justice and the Federal Trade Commission.[2]

These divergences of opinion and policy have served to keep the trade association movement in an agitated state. On the one hand, the censorious attitude of the Department of Justice has undoubtedly exerted a repressive influence upon the development of trade organization. On the other hand, the encouragement and co-operation held out by the Department of Commerce and the several technical bureaus have quite as certainly stimulated trade organization; and, by an easy analogy, even the expectation of eventually obtaining legal sanction for unified regulation of supply and control of price, when exercised with moderation and self-restraint, has continued to be kept alive. In this way the hopeful but harassed co-operating groups have swung along in recent years, now heartened by the encouraging spirit of their proponents and strengthened by the addition of some new body

[1] Correspondence between Secretary Hoover and Attorney-General Daugherty, December 11 and 19, 1923.

[2] Consult the Federal Trade Commission's report on "Lumber Manufacturers' Trade Associations," 1922, pp. 2–3.

of determined industrialists, now daunted by some unforeseen thrust of their detractors and weakened by the defection of disillusioned business executives.

Since the present usefulness and future status of trade associations are largely dependent upon the character of the governmental attitude toward them, a detailed analysis of the legality of their activities will be undertaken to supplement the descriptive survey of their organization and achievements. As a further preliminary, therefore, it will be necessary to trace briefly the evolution of public policy, in its more general aspects, toward industrial combination and business co-operation as they have developed in the United States.

CHAPTER II

THE EVOLUTION OF PUBLIC POLICY TOWARD COMPETITION AND CO-OPERATION

§1. The Maintenance of Competition at Common Law

From the beginning of our national life it has been the policy of American law to foster competition in trade and industry. This policy, which still dominates the economic thought of the western world and under which the outstanding material achievements of our civilization have been realized, has proceeded on the theory that the spontaneous adjustment of individual interests provides the most satisfactory regulation of industrial control and the most effective stimulation of economic development. It was borrowed from the English common law of the eighteenth century, and it has continued to be enforced in the American courts on the basis of several specific common law doctrines naturally derived therefrom and calculated, directly or indirectly, to maintain the competitive organization of industry. Not until the closing two decades of the nineteenth century did statutory enactments come to supplement and modify these customary rules to any noteworthy degree. The principal common law doctrines which were thus directed to the preservation of a free and open market and which have served as the foundation-stones of the prevailing public policy toward industrial combination and business co-operation are these: the doctrine of restraint of trade, the doctrine of conspiracy to monopolize, and the doctrine of unfair competition. Into the devious ramifications of these doctrines this is no place to explore. It must suffice to set forth briefly their general meaning.

The phrase *restraint of trade*, as used in the courts, had a twofold significance. Technically and traditionally it meant a contractual limitation of one's privilege or "right" to carry on a certain business or occupation, as a means of pro-

tecting the good-will of the buyer against the encroachments of the seller. These contracts, usually in the form of restrictive covenants appended to the sale of a business or trade or profession, though originally held void as contrary to public policy, came to be enforceable in the courts, provided their provisions were deemed reasonable with respect to the territory encompassed by them, their duration, and the character of the enterprise included within their terms. By the middle of the nineteenth century "restraint of trade" had also come to be applied to combinations or agreements between independently organized business establishments for restricting competition among themselves. These co-operative arrangements assumed many forms, but they were generally designed to control price, to divide territory, to restrict and apportion output. In the majority of American state jurisdictions such arrangements were deemed unlawful restraints of trade and void, regardless of the presence of an express agreement, regardless of the occasion for the concerted action, regardless of the reasonableness of its terms, and regardless even of the beneficence of its specific consequences.[1]

The doctrine of *conspiracy to monopolize* was not dissimilar in its general scope and purport from the doctrine of restraint of trade as applied to combinations and agreements among competitors. It implied not only a more pervasive and more enduring control of the market than was usually achieved through loose co-operative arrangements, but also the exercise of obstructive and harassing tactics designed to drive outsiders from the field. When a combination in restraint of trade reached out to unify, not only certain specifically enumerated policies of the several constituents, but their business organization as well, and manifested an intent to exclude actual or potential competitors, it clearly became subject to the denomination of a conspiracy to monopolize. Moreover, a restraint of trade, if sufficiently extensive in its scope, might amount to a conspiracy to monopolize, regardless of the form through which it was effected.

[1] See *Emery v. Ohio Candle Co.*, 47 Ohio St. 320 (1890); *More v. Bennett*, 140 Ill. 69 (1892); *Morris Run Coal Co. v. Barclay*, 68 Pa. St., 173 (1871); *Stanton v. Allen*, 5 Denio (N. Y.) 434 (1848); *Anderson v. Jett*, 89 Ky. 375 (1889); *Pocahontas Coke Co. v. Powhatan Coal Co.*, 60 W. Va. 508 (1906); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880).

By the doctrine of *unfair competition* business men were forbidden to "pass off" their wares to customers as the products of their rivals in trade. It was a branch of the law of fraud, and deception of the buying public was essential to the commission of the wrong involved. While this rule of unfair competition was designed, primarily, to protect individual property rights it served, indirectly, to assist in some measure in rendering the competitive process free from artificial or arbitrary encumbrance.

The relationship of these common law doctrines to the subsequent development of statutory enactments will become further clarified by noting the character of the remedies available in the event of their violation. The doctrine of restraint of trade provided no positive remedy for the situations it comprehended. The law simply discouraged the creation of restraints upon trade by refusing to lend the assistance of the courts to their execution. In other words, contracts in restraint of trade were not prohibited; they were merely unenforceable. They generally reached the courts through the initiative of the parties to them, because of some violation of their various stipulations, and when held contrary to public policy, the court merely left the parties where it found them. If a conspiracy to monopolize, by legal analogy, might afford a basis for recovery by those injured by its operation, the individual injury to each of a scattered army of consumers proved to be too insignificant to lead to actions for damages by way of civil remedy. Prosecution for criminal conspiracy, on the other hand, seems to have been regarded as too severe a mode of attack for an offense which courts imbued with the spirit of the prevailing *laissez-faire* attitude were quite willing to condone. At any rate, no prosecutions appear to be recorded.[1] Such penalties as have been latterly assessed for participation in conspiracies to monopolize have generally grown out of *quo warranto* proceedings, and have assumed the form of a forfeiture of charter or of a withdrawal of legal privileges. Unfair com-

[1] See, however, *People v. Everest*, 51 Hun. 19, 3 N. Y. Supp. 612 (1889). This was an indictment under a statute which purported to be declaratory of the common law, but which actually was non-technical in its wording and had been interpreted more broadly. Cf. *People v. Fisher*, 14 Wend. (N. Y.) 9 (1835); and *State v. Eastern Coal Co.*, 29 R. I. 254 (1908).

petition was not regarded by the common law as a public offense. It simply gave rise to a right of action by injured rivals in trade; and this right of action extended to nothing more than a deceitful deflection of patronage. The relationship between unfair practices and the maintenance of competitive conditions was not consciously comprehended in the public policy toward restraint of trade and monopoly, and spying upon competitors, rebating, and other so-called unfair methods of competition did not constitute even civil wrongs.

§2. The Sherman Anti-Trust Act and its Interpretation

In this state of the law commercial and industrial activity was in some degree characterized by abuses calculated essentially to obstruct the free flow of trade. In order to eliminate these abuses, the enactment of positive prohibitions was deemed necessary, and in order that these prohibitions might be made co-extensive with the large-scale enterprise and national markets which were being progressively developed during the last quarter of the nineteenth century, federal action was deemed indispensable. The alarm aroused in the popular mind by certain restrictive and quasi-monopolistic industrial activities of the late seventies and early eighties was reflected not only in the passage of the Interstate Commerce Act in 1887, but also in a large body of state anti-trust legislation. Between 1887 and 1897 twenty states had enacted laws prohibiting restraint of trade and monopolistic combination under severe penalties.[1] But the dominantly interstate character of trade and commerce, coupled with the lack of a federal common law, led to a demand for national legislation, despite the continuing enactment of state legislation. Accordingly, in 1890, Congress

[1] On state anti-trust legislation, see Joseph E. Davies, "Trust Laws and Unfair Competition," Department of Commerce, Bureau of Corporations, 1916, ch. IV, pp. 143–230; Jeremiah W. Jenks and Walter E. Clark, "The Trust Problem," rev. ed. N. Y., 1917, ch. XIII, pp. 241–253; W. S. Stevens, "Industrial Combinations and Trusts," N. Y., 1913, ch. III, pp. 43–51. The chapter in Stevens sets forth the anti-trust statutes of Kansas, Kentucky, Michigan, and North Carolina, as originally enacted. See also Report and Proceedings of Joint Committee to Investigate Trusts, New York State Senate Report, No. 40, March 9, 1897, pp. 1135–1223.

passed the Sherman Anti-Trust Act,[1] which appears to have been intended, by those who drafted its provisions, to embody the principles of the common law with respect to restraint of trade and monopoly as part of the federal jurisprudence. The act apparently did not change the substance of these common law doctrines, but it made such contracts or combinations "in the form of trust or otherwise" penal offenses,[2] granted a remedy by civil action for treble damages to any person injured "in his business or property" by the offenders, and provided for dissolution by injunctive process of the organization or arrangement condemned under its provisions. The omission of any reference in the Sherman Act to the doctrine of unfair competition, either in its narrow common law signification or in the broader aspect which it has assumed in recent years, indicates better than any other fact the true character of this legislation. It was conceived as a threatening measure, with provision for redress and punishment in case of transgression. No effort was to be made to safeguard the competitive economic process against the abuses of business conduct which frequently lead to its subversion.[3] Trade and industry were to be permitted to pursue their own course, subject only to the warning that the consummation of certain types of business arrangements might involve civil action, criminal prosecution, and public

[1] Act of July 2, 1890, 26 Stat. 209. For the legislative history of the Sherman Act see "Report of the Committee on Manufactures on the Investigation of Trusts," 50th Congress, 1st Session, House Report No. 3112, July 30, 1888; "Bills and Debates in Congress Relating to Trusts," prepared by direction of the Attorney-General, 57th Congress, 2nd session, Senate Document No. 147, 1903; Albert H. Walker, "History of the Sherman Law," New York, 1910, *ibid.*, "The Authorship of the Sherman Law, An Explanation."

[2] The positive prohibitions of the Sherman Act, as contained in the first two sections of the statute, are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . . [These acts are made criminal and penalties are provided.]

"Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor. . ." [Penalties are provided.]

[3] *U. S. v. Patterson*, 55 Fed. 605 (1893). In the opinion in this case the court declared: "It must appear somewhere in the indictment that there was a *conspiracy* in restraint of trade . . . . and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise." [No italics in the original.]

resort to injunctive relief. In short, the Sherman Act struck at the trunk and branches of a noxious growth; it neglected the roots. As originally construed, it aimed to eliminate restraint of trade and monopoly through the enforcement of competition rather than through its regulation.

Since the trade and commerce of the United States has assumed more of an interstate character year by year, the overtowering influence of federal law upon the development of the nation's industrial organization will justify, in this brief sketch of the evolution of anti-trust policy, confining attention to the fate of the Sherman Act in the courts.[1] Interpretation of statutes constitutes an integral part of the

[1] The prohibitions of the state anti-trust statutes are generally confined to agreements or conspiracies directed to raising the price of some article of commerce—that is, "goods, wares, and merchandise"—instead of condemning in broad and inclusive language, like that of the Sherman Act, all restraints of trade and attempts to monopolize commerce. Accordingly, few, if any, of the state laws have been interpreted to apply to labor organizations or to professional associations. See *Hunt v. Riverside*, 140 Mich. 538, 549 (1905); *Rohlf v. Kasemeier*, 140 Iowa 182 (1908); *State v. Duluth Board of Trade*, 107 Minn. 506 (1909). But even within the field to which they plainly and properly apply, many of them have been virtually dead letters. In only a few states has effective use been made of the legislative prohibitions against illegitimate trade combinations. Perhaps the most notable examples are Texas, Illinois, and Missouri. Texas prosecutors have been vigilant and aggressive from the very beginning of the trust movement. See *R. R. Co. v. State*, 72 Texas 404 (1888); *Houck v. Brewing Association*, 88 Texas 184 (1895); *T. & P. Coal Co. v. Lawson*, 89 Texas 394 (1896); *State v. Shippers' Compress Co.*, 95 Texas 603 (1902) *State v. Laredo Ice Co.*, 96 Texas 461 (1903); *National Cotton Oil Co. v. State*, 72 S. W. 615 (1903); *Waters-Pierce Oil Co. v. State*, 48 Texas Civ. App. 162 (1907); *State v. Racine Sattley Co.*, 134 S. W. 400 (1911); *Crandall v. Scott*, 161 S. W. 925 (1913); *Watkins Medical Co. v. Johnson*, 162 S. W. 394 (1913). The enforcement of the Illinois statute has grown more and more lax since 1900, after a decade in which the courts found ample opportunity to apply it. See *Distilling Co. v. People*, 156 Ill. 448 (1895); *Ford v. Chicago Milk Association*, 155 Ill. 166 (1895); *Harding v. American Glucose Co.*, 157 Ill. 284 (1899); *Chicago Coal Co. v. People*, 214 Ill. 421 (1905); *Sanford v. People*, 121 Ill. App. 619 (1905). During the last two decades no state of the union has evinced a more vigorous and uncompromising opposition to monopolistic combines in trade and industry than the state of Missouri. See *National Lead Co. v. Paint Co.*, 80 Mo. App. 247 (1899); *State v. Associated Press*, 159 Mo. 410 (1901); *State v. Armour Packing Co.*, 173 Mo. 356 (1903); *State v. Swartzschild and Sultzberger Co.*, 173 Mo. 394 (1903); *State v. Continental Tobacco Co.*, 177 Mo. 1 (1903); *State v. Waters-Pierce Oil Co.*, 194 Mo. 154 (1905); *State v. Standard Oil Co.*, 218 Mo. 1 (1909); *State v. International Harvester Co.*, 237 Mo. 369 (1911); *State v. People's Ice Co.*, 246 Mo. 168 (1912); *State v. Assurance Co.*, 251 Mo. 278 (1913); *State v. Arkansas Lumber Co.*, 260 Mo. 212 (1914); *State v. Polar Wave Ice Co.*, 259 Mo. 578 (1914); *State v. Armour Co., et al.*, 265 Mo. 121 (1915); *State v. Blattner*, 226 S. W. 253 (1920). On the whole, however, the state courts have failed to contribute much to the formulation of anti-trust policy and to the realization of its manifest purpose. The truth is that the state statutes have not provided adequate machinery for the enforcement of their provisions. Their effectiveness depends largely upon the alertness of public opinion and the ambition of public officials.

process of adjudication, and such interpretation frequently involves the conscious or unconscious judicial adjustment of legal rules to changing economic conditions. The flexibility of law in this respect has been strikingly illustrated in the development of the judicial application of the Sherman Act. In the beginning, for example, the effectiveness of the statute was greatly curbed by decisions which, drawing a sharp distinction between manufacture and commerce, seemed to render the federal law inapplicable to combinations in the basic manufacturing industries.[1] And it is a matter of record that from 1892 to 1896 not a single proceeding, other than those involving interstate transportation, was successfully maintained under the Sherman Act. Indeed, the first decision of the Supreme Court dissolving a combination in restraint of trade in the manufacturing industries was not rendered till 1899; and even in this case the decision involved a loose pooling arrangement rather than a close combination.[2] This early attitude of the courts accounts, in no small measure, for the multiplication of industrial consolidations during the late nineties.[3] But within the circumscribed field in which the Sherman Act was held to be applicable and the federal

[1] *U. S. v. E. C. Knight Co.*, 156 U. S. 1 (1895). The Supreme Court, through Chief Justice Fuller, said (p. 12): "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds manufacture, and is not part of it." Again (p. 17): " . . . the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations." See also *In re Greene*, 52 Fed. 104 (1892): "But Congress certainly has not the power or authority under the commerce clause . . . to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control, and disposition of property."

[2] *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211 (1899).

[3] Chief Justice Taft has written as follows on the influence of the decision in the Knight case: "The effect of the decision in the Knight case on the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts which, by the acquisition of all or a large percentage of the plants engaged in the manufacture of a commodity, by the dismantling of some and regulating the output of others, were making every effort to restrict production, control prices, and monopolize the business. So strong was the impression made by the Knight case that both Mr. Olney and Mr. Cleveland concluded that the evil must be controlled through State legislation, and not through a national statute, and they said so in their communications to Congress." William Howard Taft, "The Anti-Trust Act and the Supreme Court," New York, 1914, p. 60. And Professor Henry R. Seager has noted the

courts to have jurisdiction, there was no disposition evinced by the Supreme Court to moderate the explicit declarations of the statute;[1] and in due course the intimate relationship between manufacture and commerce, although the two continued to be distinguished, was accorded such judicial recognition as to remove the obstacles to the enforcement of the anti-trust act resulting from the delimitation of the scope of interstate commerce.[2]

Three principal issues have arisen in the construction of the terms of the Sherman Act: first, whether the method employed in effecting restraint of trade or monopoly in any way determines the question of legality; second, whether the restraint of trade or monopoly sought or effected must be all-embracing in scope in order to be unlawful; and third, whether the restraint of trade or monopoly must be nefarious in purpose and oppressive in effect in order to constitute a violation of the statute. In short, the determination of what constituted illegal restraints under the law has revolved about the question of their method, the question of their scope, and the question of their nature.

§3. Methods of Restraint of Trade and Monopoly

With regard to the legal significance of the methods employed to secure control of the market, it should be noted

following concrete results: "Lulled into a false sense of security by the outcome of the Knight case and by the inactivity of the government, trust promoters entered upon their task after 1897 with a zeal and success unprecedented in the financial history of the country. According to the careful tabulation made by Mr. Moody [in 'The Truth about the Trusts'], 82 combinations with a capitalization of slightly over $1,000,000,000 were organized prior to January 1, 1898, as compared with 236 with a capitalization of over $6,000,000,000 between that date and January 1, 1904." Henry R. Seager, "The Recent Trust Decisions," *Political Science Quarterly*, Vol. XXVI, no. 4, December, 1911, p. 588.

[1] *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *U. S. v. Joint Traffic Association*, 171 U. S. 505 (1898); *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211; *Montague v. Lowry*, 193 U. S. 38 (1904); *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904).

[2] It is now generally agreed that the decision of the Supreme Court in the Knight case was largely influenced by defects in the pleadings and in the proofs. See William Howard Taft, "The Anti-Trust Act and the Supreme Court," New York, 1914, p. 59. Accordingly, while the Knight case has not been specifically overruled, subsequent decisions in anti-trust cases have conformed to a much broader conception of interstate commerce, and the dominance of federal authority over industrial combinations has been progressively extended. See *U. S. v. New England Fish Exchange*, 258 Fed. 732 (1919); *Stafford v. Wallace*, 258 U. S. 495 (1922); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922); *Board of Trade v. Olsen*, 262 U. S. 1 (1923).

that the Sherman Act has been utilized effectively to reach concerted action leading to restraint of trade and monopoly through whatever form or mode of organization it might be achieved.[1] The courts have uniformly subordinated the question of outward garb to that of essential purpose. Restraints effected through agreement or combination among erstwhile competitors have been deemed inconsistent with the provisions of the Sherman Act, regardless of the specific means by which the prohibited results were attained. Accordingly, agreements aiming to control price and arrangements designed to curtail output or to divide territory have been condemned, whether effectuated through temporary concert of action or through the instrumentality of established business organizations like trade associations. In like manner, combinations in restraint of trade and quasi-monopolistic consolidations have been held to be subject to the prohibitions of the Sherman Act, whether organized in the form of "trusts," or of holding companies, or of property-owning corporations. In the words of the Supreme Court, ". . . the generic designation of the first and second sections of the law, when taken together, embrace every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."[2]

Were the provisions of the Sherman Act, as thus construed, applicable to market control secured through independent action leading to exclusion of outsiders as well as to restraints imposed by combination or agreement? In other words, was it unlawful for a vigorous and ruthless trader to set out, by himself, upon a course deliberately calculated to destroy the business of his competitors and thus engross the market? It is generally agreed that a monopoly of merit—

[1] The following cases illustrate the great variety of methods employed to achieve restraint of trade or monopoly and the uniformity with which they have been held illegal: *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 21 (1899); *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904); *Swift v. U. S.*, 196 U. S. 375 (1905); *Dr. Miles Medical Co. v. J. D. Park & Sons Co.*, 220 U. S. 373 (1911); *U. S. v. American Tobacco Co.*, 221 U. S. 106 (1911); *U. S. v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20 (1912); *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502 (1917); *American Column & Lumber Co. v. U. S.*, 257 U. S. 377 (1921); *Federal Trade Commission v. Beechnut Packing Co.*, 257 U. S. 441 (1922).

[2] *U. S. v. American Tobacco Co.*, 221 U. S. 106, 187 (1911).

that is, dominant or even complete control of a trade or industry secured through efficiency in manufacturing and marketing processes—does not contravene the provisions of the anti-trust law. Such a monopoly of merit is probably lawful even if it is the result, in whole or in part, of a process of combination rather than of independent expansion. There is no binding authority, however, on the question of the legality of market control secured by a single individual or corporation through practices evincing an intent to destroy competitive rivalry by means other than economic superiority and thus to dominate the field. The dicta of the Supreme Court have been unofficially construed as rendering the prohibitions of the Sherman Act applicable to the exclusive as well as to the inclusive method of securing monopoly control—that is, to individual domination of the market through unfair trade tactics as well as to the achievement of the same result by means of concerted action;[1] but the Supreme Court decisions have been confined to cases involving agreement and conspiracy, and the lower federal courts have shown a disposition to regard the method of mere exclusion as falling without the scope of the anti-trust law.[2]

[1] See Robert L. Raymond, "The Standard Oil and Tobacco Cases," 25 *Harvard Law Review* 31, 53: "A corporation, whether it represents a combination or not, may not attempt to acquire monopoly control. It may not increase its trade by interfering with the right of others to trade, that is by killing off or preventing the competition of outsiders by means of unfair methods. Unfair methods are many, and no general description can cover them all. Broadly speaking, they consist principally in acts which, *standing alone*, are not for the benefit of the corporation, but for the purpose of injuring others."

[2] There were at least two organizations prosecuted under the Sherman Act which seem to have been built up by the method of exclusion, the National Cash Register Company and the Du Pont de Nemours Company. Yet in both cases the lower federal courts emphasized the element of conspiracy within the companies themselves, through their officers, in testing their lawfulness. *U. S. v. Patterson*, 55 Fed. 605 (1893); *U. S. v. E. I. Du Pont de Nemours*, 188 Fed. 127 (1911). Upon the same basis, which appears in the nature of a convenient legal fiction, inasmuch as the business unit operating the property and securing the resultant profits in each instance was a single legal person—namely, the corporation—the officers of the American Naval Stores Company were convicted of a conspiracy to restrain trade and to monopolize commerce. Although the judgment was reversed by the Supreme Court, the opinion clearly discloses that the exclusive method of monopolizing, i. e., the harassing of competitors, is not deemed by the court to be unlawful under the Sherman Act, unless it is conducted as a conspiracy. "One of the means alleged," said the court, "was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic it would have had a tendency to show the scheme alleged. But taken by itself . . . . it showed only cheating and could not warrant a finding of the conspiracy with which the defendants were charged." *Nash v. U. S.*, 229 U. S. 373, 380 (1913).

This question was from the beginning, and still remains, more or less academic in character. In practice, the exclusive method almost invariably leads to the method of inclusion—that is, the efforts of an individual enterprise to exclude others from trade through ruthless competitive practices are generally accompanied or followed by combination and agreement designed to achieve the same end. Since these two methods can scarcely be divorced, and since restraint of trade and monopoly resulting from concerted action were clearly condemned, it was perhaps unnecessary to reach a specific determination of the legality of the exclusive method of effectuating market control. It should be noted, however, that had monopoly by conquest been as unequivocally denounced as monopoly by compact, a not improbable consequence would have been a series of judicial pronouncements condemning warlike measures in trade. In point of fact, legislation of this character had to await the mood of Congress. It came, finally, in 1914. The nature of the modifications introduced thereby will be examined in subsequent pages.

§4. Scope of Restraint of Trade and Monopoly

A second fundamental issue which arose in the judicial interpretation of the Sherman Act was whether the restraint or monopoly subject to its prohibitions must be all-embracing in scope in order to be unlawful. In the beginning this element appears to have been deemed essential by the lower federal courts.[1] In the words of one of these courts, " . . . as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein."[2] And in another

[1] See *In re Corning*, 51 Fed. 205 (1892); *In re Terrell*, 51 Fed. 213 (1892).

[2] *In re Greene*, 52 Fed. 104, 116 (1892). The consequence of holding this view is seen in the decision, which exonerated the defendant, although the court recognized that he was the responsible director of the Distilling and Cattle Feeding Company, which had acquired and operated 70 distilleries and manufactured and controlled the sale of 75 per cent of the distillery products of the country. There was nothing illegal in this, the court declared, because it did not appear "that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so."

case, involving an outright price agreement among numerous lumber dealers in the states of Wisconsin, Minnesota, Iowa, Illinois, and Missouri, the court, in discharging the defendants, said: "An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it *with the object of extortion*, it is not objectionable to the statute . . ."[1]

This view of the law, so clearly out of accord with the common law doctrines as maintained in the great majority of state jurisdictions, was never adopted by the Supreme Court. From the first, the prevailing opinion in that court interpreted the statute to cover partial as well as general restraints of trade, and local as well as all-embracing monopolistic combinations. It was sufficient that the extent of the conspiracy manifested an intention arbitrarily to manipulate or obstruct market processes.[2] As was said in the very first case before the Supreme Court under the Sherman Act: "all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."[3] This represents now the settled law.

§5. Nature of Restraint of Trade and Monopoly

Finally, the outstanding issue which developed in the judicial construction of the Sherman Act concerned the

[1] *U. S. v. Nelson*, 52 Fed. 646, 647 (1892). The italicized phrase [no italics in the original] indicates that in the opinion of the court it would have been necessary to prove an effort to secure unreasonably high prices in order to establish a violation of the statute.

[2] *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 245 (1899): "Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume and extent of the dealing in the commodity, that is regarded." See also *Montague v. Lowry*, 193 U. S. 38, 46 (1904); *Loewe v. Lawlor*, 208 U. S. 274 (1908); *Steers v. U. S.*, 192 Fed. 1 (1911).

[3] *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 16 (1895).

nature of the restraints of trade condemned by the statute. How far, if at all, did the legitimacy of the purpose and the beneficence of the effect of concerted action serve to remove agreements and combinations involving market control from the prohibitions of the anti-trust law? Were all arrangements calculated to lessen competition subject to these prohibitions, or only such compacts or courses of conduct as were designed to suppress competitive conditions? Stated shortly, the issue was whether the so-called "rule of reason" should be regarded as part of the Sherman Act and utilized in its interpretation. This question obviously touched the heart of the problem.

(*a*) *The Policy of Enforced Competition*

The source of the rule of reason is to be found in the common law. Under the common law doctrine of restraint of trade, in so far as the obstruction to freedom of action was the result of a restrictive covenant accompanying the sale of a business or trade or profession, the lawfulness of the restraint hinged directly upon the reasonableness of its terms. It seems clear, however, that "restraint of trade," as used in the first section of the Sherman Act, did not contemplate, primarily, situations arising out of the relinquishment of one's privilege to carry on a certain enterprise or occupation within specified limits and for a stipulated time as a part consideration for the purchase price and by way of protection of the good-will acquired by the purchaser.[1] The principal purpose of the Sherman Act, beyond doubt, was to safeguard the free flow of interstate commerce against contracts and combinations among erstwhile competitors designed or calculated to restrain trade or control the market, and under the common law rules prevailing in most American jurisdictions, such contracts or combinations were deemed illegal, without regard to the reasonableness of their purpose or effect. Moreover, the language of the statute specifically included *every* contract or combination in restraint of trade.

[1] At least at this late date this is not open to controversy. There has never been a case exclusively of this nature contested under the Sherman Act. Nevertheless, see the dissenting opinion of Justice Holmes in *Northern Securities Co. v. U. S.*, 193 U. S. 197, 404 (1904). Cf. *Shawnee Compress Co. v. Anderson*, 209 U. S. 423 (1907).

Nevertheless, the contention was made promptly in the courts that since Congress had used technical terms in incorporating common law principles into the federal jurisprudence, the meaning of the prohibitions of the anti-trust law must be so construed, in the light of the common law conception of reasonableness, as to exclude "reasonable" restraints, even when they emerge as the result of agreement or combination.[1] It was urged that this common law conception of reasonableness, whereby the validity of business conduct was tested by the balancing of private rights and public interests, was part and parcel of the very language of the act, and served to define the nature of the restraints condemned by its prohibitions. The plausibility of this position appealed to not a few members of the judiciary, including a minority of the justices of the Supreme Court. The conflicting views came into open opposition when the Trans-Missouri Freight Association case reached that court in 1897.[2] The issue was clearly presented and strenuously argued in that case, and by a five-to-four decision the court rejected the contention, as follows: "When . . . the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States . . ., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."[3]

From this time until the decision of the Northern Securities case in 1904, the issue of the rule of reason continued to be the subject of debate; but the original majority view was not disturbed by the ruling which dissolved the famous Hill-Morgan holding company in that case. It is worthy of note, however, that while other issues were the storm-center of controversy in that litigation,[4] one member of the court

[1] *U. S. v. Trans-Missouri Freight Association*, 53 Fed. 440 (1892).

[2] *Ibid.*, 166 U. S. 290 (1897).

[3] *Ibid.*, p. 328.

[4] *U. S. v. Northern Securities Co.*, 193 U. S. 197 (1904). The case appears to be authority, principally, for this proposition: that the suppression of competition in railroad transportation over a vast section of the country, by a combination of carriers through the instrumentality of a holding company, cannot be shielded from

who had sided with the majority in 1897 felt impelled to shift his ground.[1] And the definite establishment, through the Northern Securities decision, of the doctrine that corporate combinations are subject to the prohibitions of the Sherman Act accentuated the significance of the issue as to the utilization of the rule of reason in determining the nature of unlawful restraints. The principles enunciated in the Trans-Missouri case, coupled with the rule of the Northern Securities decision, were widely construed as rendering all industrial combinations, regardless of the presence or absence of monopolistic intent or restrictive conduct, necessarily subject to condemnation under the anti-trust law. In many quarters the belief was current that this situation had produced a veritable *impasse* between economic need and legal doctrine, and that a change in the anti-trust law was inevitable, either through the judicial modification of the meaning of the existing statute or through the enactment of new legislation.[2]

the proscription of the federal anti-trust act by setting up the power of the states to create corporations and the constitutional right of citizens to own and control property. In other words, corporate combinations, as well as loose agreements, are subject to the prohibitions of the Sherman Act, and holding companies constitute such combinations. In meeting the objection that no combination was here involved, but the mere acquisition of stock by a corporation authorized to do this under state law, Justice Harlan, who delivered the opinion of the majority of the court, said (pp. 353–54): "the actual nature of the transaction . . . was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being . . . to restrain and monopolize interstate commerce by suppressing or . . . 'smothering' competition between the lines of two railway carriers." Since the court had not yet condemned a combination in restraint of trade which had been effectuated through a complete corporate merger of the absorbed properties, some still professed to perceive considerable significance in the matter of outward form. For example, in the tobacco industry, the group of men which dominated the field evolved a plan of reorganization, immediately following the Northern Securities decision, whereby the Consolidated Tobacco Company, a holding company, was eliminated, and all the assets of the American and Continental companies were merged in a new corporation, the American Tobacco Company. (Report on "The Tobacco Industry," Bureau of Corporations, 1909, Part I, pp. 128–132.) The legal futility of the device was subsequently disclosed. The Supreme Court unhesitatingly and sweepingly declared that the matter of form of combination is immaterial. *U. S. v. American Tobacco Co.*, 221 U. S. 106, 187 (1911).

[1] See concurring opinion of Justice Brewer, *ibid.*, pp. 360–361.

[2] See Robert L. Raymond, "The Federal Anti-Trust Act," 23 *Harvard Law Review* 353. In a special message to Congress on March 25, 1908, President Roosevelt set forth this view in unequivocal language: "In the modern industrial world combinations are absolutely necessary; they are necessary among business men,

(b) The Rule of Reason

Under these circumstances, the decisions of the Supreme Court in the Standard Oil and American Tobacco cases, rendered in 1911, came as a welcome relief to the business world. By that time the membership of the court had been so far changed that all save one justice acquiesced in a direct and deliberate reversal of the established interpretation of the Sherman Act. Chief Justice White was enabled to set forth, on behalf of the majority of the court, the views and doctrines which had constituted the substance of his minority opinion in the Trans-Missouri case. The "rule of reason" was declared to be an integral part of the act, and only undue or unreasonable restraints of trade or monopolistic combinations were held to be prohibited by its provisions.[1]

What, precisely, was the meaning and significance of the change thus wrought in anti-trust policy? Whatever view may be taken of the process by which the act of 1890 was modified, there is no gainsaying that its modification is now an accomplished fact. Only "undue" restraints of trade are now held to be unlawful, and that very definitely was not the attitude of the courts prior to 1911.[2] The nature of the change introduced by the rule of reason can be most clearly understood by noting carefully the implications of the legal principles prevailing prior to its enunciation.

they are necessary among laboring men, they are becoming necessary among farmers. Some of these combinations are among the most powerful of all instruments for wrong-doing. Others offer the only effective way of meeting actual business needs. It is mischievous and unwholesome to keep upon the statute books unmodified a law, like the anti-trust law, which, while in practice only partially effective against vicious combinations, has nevertheless in theory been construed so sweepingly as to prohibit every combination for the transaction of modern business. Some real good has resulted from this law. But the time has come when it is imperative to modify it." It should be noted, however, that in a subsequent passage of the same message, he admitted "that all of the suits hitherto brought by the Government under the anti-trust law have been in cases where the combination or contract was in fact unfair, unreasonable, and against the public interest." This seeming paradox arises from the fact that the Supreme Court's pronouncements on the doctrine of reasonableness were largely by way of dicta, and hence involved a threat for the future rather than undesirable conclusions in cases already adjudicated.

[1] *Standard Oil Co. v. U. S.*, 221 U. S. 1 (1911); *U. S. v. American Tobacco Co.*, 221 U. S. 106 (1911). The rule of reason was adopted over the sole but vigorous protest of Justice Harlan.

[2] The principle of the Trans-Missouri case was followed in subsequent decisions. A decade after its enunciation, the Supreme Court in a unanimous decision, said: "It has been decided that not only unreasonable, but all direct restraints of trade are prohibited." *Shawnee Compress Co. v. Anderson*, 209 U. S. 423 (1907). See, also, *Wheeler-Stenzel Co. v. National Glass Jobbers' Association*, 152 Fed. 864 (1907).

(*c*) *The Significance of the Rule of Reason*

It was contended in some quarters that the original interpretation might produce patently absurd results in the application of the Sherman Act. Since restraint of trade had been judicially construed to comprehend the voluntary restriction of competition among those engaged in the same trade or industry, and since every partnership, every act of incorporation, and practically every business agreement necessarily involves, in some direction and in some degree, a diminution of competition between the parties to the arrangement, it was argued that the doctrine of the Trans-Missouri case was calculated to obstruct and destroy that freedom of interstate commerce which it was the purpose of the anti-trust law to foster and maintain. Such an absurd and destructive outcome of the original interpretation of the act may have been among the logical implications of the rule that *every* contract or combination in restraint of interstate trade, whether reasonable or unreasonable, is unlawful; but Justice Peckham in the Joint Traffic Association case forcefully denied that the Supreme Court entertained any such views.[1] The emphasis of the court, however, was upon the enforcement of competition. Restraint of competition and restraint of trade were conceived to be identical. Under this policy combinations by agreement, though merely designed to regulate competition and perhaps to promote trade thereby, appear to have been regarded as definitely in contravention of law as arrangements calculated to stifle competitive conditions. By the introduction of the rule of reason the Supreme Court put itself in position to differentiate between schemes to control market processes and co-operative efforts to foster trade and safeguard competition from abuses. The maintenance of competitive conditions was deemed to be essential to the protection of the public interest; but not every direct lessening of competition was to be regarded as a violation of the anti-trust law. The Sherman Act was construed to be directed neither against "big business" as such, nor against corporate consolidations as such, nor against joint action as such among competitors. But arrangements which were designed or calculated to suppress the competi-

[1] *U. S. v. Joint Traffic Association*, 171 U. S., 567–568 (1898).

tive principle, to stifle the force of competition, in any market area, through the collusive association of producers or traders, still constituted unlawful restraints of trade. In other words, the essence of the evil sought to be averted was recognized to lie, not in the mere fact of associated action, but in its influence upon the competitive situation and in its consequent effect upon the public welfare. In the words of Justice Brandeis:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; the condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting that particular remedy, the purpose or end sought to be attained are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."[1]

Through the adoption of the rule of reason the courts were clothed with a large measure of discretion in applying the Sherman Act. The legality of combination was no longer to be determined simply with reference to the degree of centralization of control effected in any industry. There had to be considered in addition the manner in which that control had been exercised, as a means of judging the lawfulness of intent.

While outright price agreements, and arrangements directed to curtailment of production, apportionment of output, division of territory, and exclusion of strangers from the market, appear clearly to involve such undue or unreasonable restraint of trade, there are numerous forms of associated action, as will appear in subsequent pages, the essential character of which, from the standpoint of maintaining the competitive principle and safeguarding the public interest, can be determined only through the exercise of judicial dis-

[1] *Chicago Board of Trade v. U. S.*, 246 U. S. 231, 238 (1917).

cretion, in the light of all the circumstances and conditions of each particular case. Whether a given practice goes to the heart of the competitive process and tends to stifle it, or simply serves to regulate the operation of competitive forces, in the interest of efficiency and stability and orderly development, is not subject to determination by means of rigid rule or automatic interpretation.

In cases involving corporate consolidation the difficulties inherent in the application of the rule of reason are even greater. The entire history of the combination constitutes the source of relevant fact material touching its legality. The circumstances surrounding its organization, the purposes and ambitions of its promoters, the character of the competitive practices pursued in its administration, and the nature of its attitude toward the public as evidenced by its production and price policies are among the primary considerations from which its intent and capacity to suppress competitive conditions and achieve monopoly power may be gathered.[1] While the acquisition of a dominant influence or control over the market, or some section thereof, through the combination of a large number of previously competing concerns, may be sufficient to establish a presumption of unlawful restraint of trade, effective condemnation under the rule of reason is largely dependent, not upon the mere cessation of competition among the constituents of the combination, but upon the utilization of oppressive tactics toward outside competitors and the consuming public.[2] Such tactics, by dis-

[1] In the American Tobacco case (221 U. S., 182–183) (1911) the Supreme Court enumerated a great variety of considerations which led to its condemnation of the combination; and in the Standard Oil case, the judgment was declared to be based upon "a jungle of conflicting testimony covering a period of forty years." (221 U. S., 48) (1911).

[2] In the Standard Oil case the court found that the mere transfer to the New Jersey corporation of the stocks of so many other corporations created a *prima facie* presumption of intent and purpose "of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce"; and that this presumption was made conclusive by the conduct of the defendants, which clearly disclosed "that the very genius for commercial development and organization which it would seem was manifested from the beginning, soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." 221 U. S. 75, 76.

closing the mode in which the power of the combination is exercised, throw searching light upon the dominating intent and probable consequences of the concentration of industrial control under attack.[1] If the power naturally vested in an industrial combination has been abused—if rivals in trade have been ruthlessly harassed, if potential competition has been artificially obstructed, if the public has been harmed through extortionate prices—the arrangement is deemed unlawful and subject to the penalties of the anti-trust law.[2] If, on the other hand, the circumstances and terms of the combination disclose no unlawful intent, and the exercise of its power is not designed to obstruct the activities of outsiders or to dominate the market, the arrangement will not be disturbed.[3]

These, it is submitted, are the legitimate implications to be drawn from the doctrine that only undue or unreasonable restraints upon interstate trade are in violation of the Sherman Act. They represent the basic considerations which guide the courts in the current adjudication of controversies involving trade combination. It is apparent that in the light of these considerations, the legality of concentration of control in the industrial field is largely determined by the court's conception of its influence upon the public welfare. Since public welfare is necessarily a somewhat vague concept

[1] In the Steel Corporation case the court declared that "the law does not make . . . the existence of unexerted power an offense"; and it further asserted, by way of conclusion: "Whatever there was of evil effect was discontinued before this suit was brought and this, we think, determines this decree." From opinion of Justice McKenna in *U. S. v. U. S. Steel Corporation*, 251 U. S. 417, 451 (1920).

[2] *Buckeye Powder Co. v. Du Pont Co.*, 248 U. S. 55, 64 (1918). In denying the right of the plaintiff to triple damages under section 7 of the Sherman Act, Justice Holmes, speaking for a unanimous court, declared: ". . . the plaintiff must show that the defendant used its power oppressively, if not against the plaintiff, at least in the course of defendant's business."

[3] *U. S. v. United Shoe Machinery Co.*, 247 U. S. 32 (1918). The record in this case showed that the defendants had obtained control of the manufacture of 96.3 per cent. of the total volume of shoe machinery in lines in which it was subject to competition, and there were several kinds of shoe machines of which it was the sole producer. Commenting upon the numerous acquisitions of competing plants and patents which had contributed to this extensive control, the court declared (p. 54): ". . . the acquisitions may be said to be justified by the exigencies or conveniences of the situation." And the court added, further: "The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained." See, also, *National Association of Window Glass Manufacturers et al. v. U. S.*, 263 U. S. 403 (1923) and *U. S. v. American Can Co.*, 234 Fed. 1019 (1916).

of constantly changing content, the courts, in seeking to safeguard the general interest against overreaching private enterprise, must inevitably exercise a large measure of judicial discretion. It is not to be assumed, however, that even under the rule of reason the courts are the depositaries of an unlimited or an uncharted discretion. The courts possess no authority to invalidate every arrangement which they deem contrary to the public interest, or to approve or "legalize" every situation which they deem meritorious in intent and beneficent in effect. The judicial discretion inherent in the application of the rule of reason consists, primarily, in differentiating between those arrangements which merely mould or regulate the competitive process and those which tend to obstruct or destroy it. In the determination of this difficult issue, the purpose and effect of joint action or unified ownership become relevant and frequently controlling considerations. But the rule of reason does not abrogate or relinquish the principal objective of anti-trust policy—namely, the maintenance of the competitive organization of industry; it but recognizes the need of distinguishing between the mere fact of concerted action, and its tendency, as evidenced by its character and purposes and methods and consequences, to stifle competition, to obstruct the free flow of commerce, to restrain trade, to create monopoly. Under this construction of the prohibitions of the Sherman Act, the emphasis of anti-trust policy is shifted from the fact of combination or co-operation to the manner of business conduct thereunder.

§6. The Trust Legislation of 1914

This shift in emphasis was expressly and concretely incorporated in the trust legislation of 1914.[1] The combined purpose of the Clayton Act and the Trade Commission Act,

[1] Federal Trade Commission Act, 38 Stat. 717 (Sept. 26, 1914); Clayton Act, 36 Stat. 730 (Oct. 15, 1914). For the legislative history of the 1914 enactments, see "Report on the Federal Trade Commission," Committee on Interstate Commerce, 63rd Congress, 2nd session, Senate Report No. 597, 1914; "Report on Unlawful Restraints and Monopolies," Committee on the Judiciary, 63rd Congress, 2nd session, Senate Report No. 698, 1914; "Report to accompany H. R. 15657," Committee on the Judiciary, 63rd Congress, 2nd session, House Report No. 627, 1914; E. D. Durand, "The Trust Legislation of 1914," *Quarterly Journal of Economics*, Vol. 29, Nov., 1914, pp. 72–97; W. H. S. Stevens, "The Trade Commission Act,"

which constitute this legislation, was to supplement the Sherman Act in the way of substantive prohibitions, and to create an administrative agency for the more continuous and effective enforcement of the new anti-trust policy. The trust legislation of 1914 was the outcome, not merely of the changed analysis of the so-called "trust problem" foreshadowed by the Standard Oil and American Tobacco decisions of 1911, but of the disclosures which were coming to light in the process of enforcement of the Sherman Act. The vigorous prosecution of industrial combination between 1901 and 1912, during the Roosevelt and Taft administrations, had revealed an extensive utilization in commerce and industry of demoralizing and destructive methods of conducting trade rivalry. There was a growing suspicion that not a little of the responsibility for the growth of quasi-monopolistic conditions in certain fields of economic activity could be traced to the use of these unfair tactics. The futility of merely repressing formidable aggregations of industrial power, by attempting to dissolve them after they had achieved threatening proportions, without any public effort to abate their development, became more and more apparent. Moreover, despite the excellent accomplishments of the Bureau of Corporations, organized in 1903 upon the insistent recommendation of President Roosevelt, within the restricted compass of its powers, the need of additional facilities for bringing to light violations of the law, for giving publicity to the current conduct of business, and for correcting trade abuses impressed itself upon the public mind. One of the ablest and most influential of the public men sponsoring these views was Woodrow Wilson,[1] and under his leadership they were incorporated in the program to which the Democratic Party pledged itself in the campaign of 1912.[2] The victory of the Democratic candidate in that campaign was con-

American Economic Review, Vol. 4, Dec., 1914, pp. 840–855, "The Clayton Act," *ibid.*, Vol. 5, March 1915, pp. 38–54; P. G. Wright, "The Contest in Congress between Organized Labor and Organized Business," *Quarterly Journal of Economics*, Vol. 29, Feb., 1915, pp. 235–261; A. A. Young, "The Sherman Act and the New Anti-Trust Legislation," *Journal of Political Economy*, Vol. 23, March, 1915, pp. 201–220, *ibid.*, April, 1915, pp. 305–326, *ibid.*, May, 1915, pp. 417–436.

[1] See Woodrow Wilson, "The New Freedom," New York, 1913, and examine "Seven Sisters Acts," New Jersey, Laws of 1913, ch. 13–19, inclusive.

[2] "Campaign Text Book of Democratic Party, 1912," p. 2.

strued as an endorsement of these views by the national electorate, and they became the basis of the important trust legislation enacted in the fall of 1914.

The Clayton Act is the less satisfactory and the less significant of the two measures which represent the fulfilment of this program for a revision of anti-trust policy. Leaving aside the several unrelated matters and equivocal declarations which make up more than half of the sections of this more or less "hodge-podge" statute, two specific trade practices are declared to be unlawful, and two types of trade relationship are condemned. Sections two and three forbid, respectively, price discrimination and restrictive sales and leases (so-called "tying contracts"), under circumstances which may "substantially lessen competition or tend to create a monopoly." The general prohibition of "unfair methods of competition," which logically belongs in the Clayton Act, since this act was designed "to supplement existing laws against unlawful restraints and monopolies," was in fact incorporated in the Trade Commission Act, and it is questionable whether the prohibition of these two specific trade practices does not narrow, rather than broaden, the scope of public authority over unfair competition. Sections seven and eight interdict, respectively, intercorporate stockholding and interlocking directorates under circumstances that would tend to a violation of the anti-trust laws.

The Trade Commission Act appears to be the principal embodiment of the ideas sponsored by President Wilson for a new orientation of anti-trust policy. It sets up the Federal Trade Commission and defines its powers and duties. It is not a commission to regulate industrial combinations, as the Interstate Commerce Commission regulates the railroads; that would have been a fulfillment of the Rooseveltian program of recognition and administrative control of trusts. The Federal Trade Commission is charged, rather, to keep the channels of interstate trade open to free and healthy competition. It has the double duty of discovering and, in co-operation with the Department of Justice, suppressing monopolistic combinations, and of protecting independent business units, and ultimately the interests of the public, against unscrupulous competitive conduct. It is at once

a fact-finding body and more. The Commission is an independent administrative tribunal, created by and responsible to Congress, empowered to prosecute "unfair methods of competition," which, by its own organic act, are declared to be unlawful.[1] To focus public attention upon the essentially self-regulating mechanism of business, rather than to operate the levers, and to preserve the economic processes of the national life clean and wholesome, rather than to punish offenders—these are the basic ends for which the Federal Trade Commission was designed.

Sufficient time has not elapsed since the 1914 legislation was enacted to determine fully and precisely its effect upon the organization and functioning of national trade and industry. But the enforcement of the two statutes has already revealed something of their significance in elaborating and modifying the fundamental public policy laid down in the Sherman Act as judicially interpreted. While the courts have manifested some reluctance to extend the scope of the prohibitions of the Clayton Act beyond the range of adjudicated restraints of trade under the Sherman Act,[2] the fifth section of the Trade Commission Act so clearly and unequivocally set forth the intention of Congress not only to frustrate restraints of trade but also to forestall them, that the courts have recognized under this provision a mandate to extend the scope of the prohibited practices beyond those previously deemed unlawful at common law or under the Sherman Act.[3] The Federal Trade Commission is engaged, accordingly, in gradually circumscribing the field of fair and legitimate trade competition.

[1] Section 5 of the statute enacts: "That unfair methods of competition in commerce are hereby declared unlawful."

[2] *Federal Trade Commission v. Gratz*, 253 U. S. 421 (1920), and same, 258 Fed. 314 (1919); *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568 (1923), and same 270 Fed. 881 (1921); *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463 (1923); *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774 (1923).

[3] *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483 (1922); *Royal Baking Powder Co. v. Federal Trade Commission*, 281 Fed. 744 (1922); *Sears Roebuck Co. v. Federal Trade Commission*, 258 Fed. 307 (1919). In *Federal Trade Commission v. Beechnut Packing Co.*, 257 U. S. 441 (1922), a new form of resale price maintenance plan was condemned by the court. The majority held that a contractual agreement was not essential to show unfairness of competition in the pursuit of this policy, regardless of what might have been necessary to conviction for pursuing a similar policy under the Sherman Act, as in *U. S. v. Colgate Co.*, 250 U. S. 300 (1919). Cf., however, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346 (1922); *Aluminum Co. v. Federal Trade Commission*, 284 Fed. 401 (1922).

§7. Anti-Trust Policy and the Trade Association Movement

The relationship of these new developments in anti-trust policy to the trade association movement is obvious. They appear to provide a generous measure of opportunity, and even of encouragement, to trade co-operation which is honestly constructive and which is designed for mutual protection and the maintenance of genuine freedom in commerce and industry. Secrecy and chicanery and collusion are rendered as definitely illegal as they have always been patently improper. Conspiracy and manipulation and predatory tactics being closed as a pathway to profits, it remains only for the enlightened leaders in trade association work to align their organizations unreservedly with the efforts of the law to regulate the competitive process and to reconcile its functioning with co-operation for efficiency. As it is a prime function of the Federal Trade Commission to focus the light of publicity upon every hallway, closet, and corner of the industrial structure, so it may well be made the guiding principle of trade association activity to facilitate the provision of full and continuous and accurate information upon all significant aspects of their industries to their members and to the public, in order that competition may be intelligently directed as well as free from obstruction. And as it is the duty of the Federal Trade Commission, by a quasi-judicial process of inclusion and exclusion of actual practices, to define the rules of fair competition in the general field of commerce and industry, so it is the privilege of trade associations to co-operate in interpreting the nature and implications of these rules and in securing their observance within the special province of each trade. The recent development of the procedure known as the "trade-practice submittal" is a concrete manifestation of the possibilities of achievement in this direction. It is among the promising signs of the approach of a more cordial relationship between coercive and voluntary agencies for the regulation of business conduct.[1]

[1] The Annual Report of Federal Trade Commission for 1923 (p. 17) contains the following suggestive passage describing this novel procedure:

"From time to time the commission is approached by groups of business men

The feeling of uncertainty which surrounds trade association work under the existing state of the law is only partly grounded in the shortcomings of the specific legal rules applicable to trade association activities. A certain measure of uncertainty is inherent in all legal doctrines, to whatever sphere of human affairs they may apply. Men often speak of the need of clarifying the law, but seldom with a keen perception of how a proper balance may be struck between rule and discretion. Elasticity is fully as essential as definiteness in the application of the principles designed to govern human behavior. The general policy of the law toward concentration of control and co-operative action is now well defined; the difficulties arising in its concrete application are due very largely to the intricate and complex situations which constitute practical business experience. And these difficulties are accentuated by the comparative recency of vigorous trade association activity, by the newness of the concept of "co-operative competition," and by the emergence of conflicts of opinion within the various departments of government.

§8. Summary of Legal Position of Trade Associations

The legal principles governing trade associations are not essentially distinguishable from those applying to other forms of business organization. The problem is mainly one of concrete application to specific types of business arrange-

representing an entire industry and seeking the assistance of the commission in the elimination from their industry of practices found to be unfair and harmful but which the industry is unable by itself to eliminate. The commission has lent its assistance in these situations and has called the industry together in gatherings which have been termed 'trade-practice submittals.' These submittals have been held in the following industries: Ink, celluloid, knit goods, paper, oil, used typewriters, creamery, hosiery, guarantee against decline, macaroni, silverware, gold knives, watch cases.

"At these submittals the objectionable practices are frankly discussed and resolutions usually adopted by the industry looking to their elimination. These resolutions are considered by the industry as binding upon it and are received by the commission as informative as to conditions in the particular industry and the views of the trade thereon.

"During the past year, at the request of manufacturers of gold-mounted knives, representing a major portion of those engaged in the industry, a trade-practice submittal was held before Chairman Murdock in New York City and was attended by 24 members of the trade. The gathering was called to discuss practices having to do with the marking of knives mounted in gold.

"The industry adopted a resolution which was intended, first, to define gold mounting and, second, to condemn any method in the construction of a gold-mounted knife by which it may be made to appear that more gold of an indicated karat fineness has been used than has been employed in fact."

ments of certain general principles, the development of which has been described. It follows that the lawfulness of a trade association depends, in every instance, upon the concrete purposes for which the association members are banded together and upon the means employed to advance these purposes. Purposes are judged in the courts primarily by actions, however, so that it is what an association does, and how it does it, which finally determines its legal status.

Under the settled law, there is a certain range of associative activities which are definitely forbidden because, in general, they tend to the suppression of competition. These activities center about the establishment of common production and price policies. There is another range of associated action for trade purposes, in which lawfulness is dependent upon the manner, circumstances and results of the joint efforts. So long as activities within this field are confined to the provision of knowledge or information, emerging from the experience of the trade, and its utilization for the orderly development of commercial and industrial processes, they tend only to regulate competitive conditions and are not usually condemned. Finally, there is a certain range of association activity which gives rise to few, if any, questions of legitimacy from the point of view of public policy. They are so unconnected with competitive business relations or conduct that issues of anti-trust law are not involved.

Various remedies are available in case a trade association is adjudged, because of the functions it has undertaken or because of the methods it uses, to be operating in violation of law. When an association is found to have been moved by illegal purposes and to have been utilized as a mere device for the prosecution of unlawful activities, and when the prevalence and persistence of these improper purposes and activities serve to color the whole fabric of the organization, the association is dissolved by the courts.[1] A trade association may, however, be proved to have indulged in illegitimate

[1] *U. S. v. Jellico Mountain Coal Co.* (Nashville Coal Exchange), 46 Fed. 432 (1891); *U. S. v. Coal Dealers' Association of California*, 85 Fed. 252 (1898). See, also, *Federal Trade Commission v. Association of Flag Manufacturers*, 1 F. T. C. Dec. 55 (1918). In each of these instances the organization was disbanded and its members permanently enjoined from engaging in like activities. *Knauer v. U. S.*, 237 Fed. 8 (1916), was a criminal proceeding but came to the same effect.

activities without the entire organization becoming thereby tainted with illegality. A court of equity in formulating its decree is guided by the object of preventing further infractions of the law. Accordingly, if in the judgment of the court the discontinuance of the condemned practice will suffice to achieve that object, it may simply enjoin the specific activity found unlawful, leaving the association otherwise unimpaired.[1] The courts are not infrequently constrained to exercise a discretion, in this connection, comparable to that of a horticulturalist who discovers a pest in one of his trees. He may decide to prune the tree of its noxious growth and attempt to save the cost of growing another in its place; or he may decide to cut down the unhealthy tree and take no chances on the recurrence or spread of the pest. Sound judgment in such situations depends upon a nice discrimination, in each case, between the malignancy of the diseased outcroppings and the essential strength and vigor of the main trunk. The courts may occasionally err in their judgment of how far outwardly wholesome branches of trade association activity may be infected with illegitimate intent. But, be that as it may, it must be remembered that not everything brought down by their axe can be considered as receiving their absolute condemnation under all circumstances.

Beyond these equitable remedies, criminal proceedings may be instituted against the guilty parties, as provided by law. It may be noted, however, that criminal penalties have been but infrequently invoked in anti-trust cases, particularly in those relating to trade associations. In addition to these public remedies, any private party injured in his business by the illegal combination is given certain rights of action. He may petition under the Clayton Act for an injunction against the continuance by the association of those activities causing him injury. He may sue under the Sherman Act for treble damages and costs if he has suffered actual loss.

In the light of these general considerations of the legal position of trade associations, a detailed analysis of their activities and of the legal status of these activities is now in order.

[1] *Southern Hardware Association v. Federal Trade Commission*, 290 Fed. 773 (1923); *Wholesale Grocers' Association v. Federal Trade Commission*, 277 Fed. 657 (1922); *Western Sugar Refinery v. Federal Trade Commission*, 275 Fed. 725 (1921); *National Harness Manufacturers' Association v. Federal Trade Commission*, 268 Fed. 705 (1920).

PART II: ASSOCIATION ACTIVITIES AND THE SUPPRESSION OF COMPETITIVE CONDITIONS

CHAPTER III

UNIFICATION IN SELLING

As has already been suggested, trade association activities, in the light of settled principles of trade and market law, appear to fall into a three-fold classification. Certain activities, fortunately not nowadays very common, considered by themselves are definitely illegal; others are presumptively legal, but may be invalidated by their special terms, attendant circumstances, or probable results; still others are clearly within the law. The process of adjudication has proceeded far enough to afford numerous instances of practices falling within each of these divisions. Accordingly, the discussion will be directed along these lines and in the order indicated.

There have appeared at least four types of trade association activity which have come under the absolute ban of the law. These activities are concerned primarily with (1) unification in selling, (2) exclusion from the market, (3) curtailment of production, and (4) price manipulation. In all these cases the concert of action has been deemed to suppress competitive conditions. These activities are held to constitute violations of law, despite the fact that the association membership involved seldom encompasses the entire trade, that these restrictive policies are not always enforced effectively, and that there always remains a potentiality of competition, however comprehensive and vigorous the control exercised by the association. In discussing these activities in the order named there is no attempt to rank them either according to their relative importance in practice or according to any supposed scale of illegitimacy.

§1. Restraints of Trade Through Concerted Selling Operations

Among the early cases arising under the Sherman Act is one involving the organization by an association of coal pro-

ducers, operating in an important district, of a corporation which pooled the output of the entire membership designed for shipment to western points and sold the same at prices fixed by a committee of the association.[1] The proceeds of sales were divided among the members according to their respective tonnage, at a uniform rate per ton, after the deduction of a fixed charge per ton to cover the expenses of the sales company. In a suit to dissolve the defendant combination, known as the Chesapeake and Ohio Coal Association, and to annul the contract between its several members and the Chesapeake and Ohio Fuel Company, which served as the sales agency of the association, the petition of the Government was readily granted by the court. In condemning the restrictive provisions of the agreement whereby the members of the association were obligated to sell exclusively to this agency, the court said: "Should the fuel company be unable in all cases to meet the price fixed, the parties are nevertheless prohibited, during the life of the contract, from dealing with others, . . . and the purchaser is not at liberty to deal with competitors for a supply of coal for this market."[2]

A few years later private redress was given by a federal court for the injury caused by such an arrangement. Upon a complaint under Section seven of the Sherman Act, a contractor in Portland, Oregon, was permitted to recover treble damages because of the interference with and added expense to his business resulting from the organization of the City Retail Lumber Company, a joint sales agency representing every lumber manufacturer in Portland.[3] This company, through the pressure it exerted upon Washington lumber mills, became the sole source of supply through which the plaintiff could procure his requirements, and these were obtainable only at artificially high prices.

Other cases of similar import arose from time to time during the ensuing decade.[4] Two of these warrant brief mention,

[1] *Chesapeake & Ohio Fuel Co. v. U. S.*, 115 Fed. 610 (1902).

[2] *Ibid.*, p. 624.

[3] *Ellis v. Inman, Poulsen & Co.*, 131 Fed. 182 (1904).

[4] In the state courts two notable decisions directly in line with the foregoing cases were *Slaughter v. Thacker Coal Co.*, 55 W. Va. 642 (1904), and *Pocahontas Coke Co. v. Powhatan Coal Co.*, 60 W. Va. 508 (1906). To the contrary effect was the holding of a New Jersey court in a case obscurely reported: *N. Y. Trap Rock Co. v. Brown*, 61 N. J. L. 536 (1898).

though they are not reported in the law books. In 1900 the General Paper Company was organized by 21 paper manufacturing concerns, which were operating chiefly in Wisconsin and Michigan and represented about 90 per cent of the paper production west of the Alleghenies, to act as their exclusive selling agency. The General Paper Company was granted power to determine the extent of the output of each of the producers. On June 16, 1906, in the United States Circuit Court for the District of Minnesota, a consent decree was entered dissolving this sales agency and granting all relief prayed for by the Government.[1]

A similar case was presented by the organization, in 1909, of the Imperial Window Glass Company, to act as the exclusive sales agent of over fifty manufacturers of hand-blown window glass, members of the National Association of Window Glass Manufacturers. Indictments of all the officers and directors of the company were met by pleas of *nolo contendere*, and on November 10, 1910, judgment was rendered against the defendants in the United States Circuit Court for the Western District of Pennsylvania and heavy fines were imposed.[2] It may be noted that the secretary of the Imperial Window Glass Company, which was at once dissolved, subsequently set up an independent brokerage business in his own name. Since 1912 this concern has acted as the exclusive selling agency for some thirty manufacturers, the makers of a predominant part of the hand-blown product and including substantially all of the concerns remaining in business which had formerly sold through the Imperial Company. The agent and the principals alike are now awaiting trial once more under an indictment returned March 17, 1922, in the United States District Court for the Southern District of New York.[3]

[1] List of Cases Instituted by the United States under the Federal Anti-trust Laws, Department of Justice, Washington, December 15, 1923, p. 71 (*United States v. General Paper Co. et al.*).

[2] *Ibid.*, p. 82 (*United States v. Imperial Window Glass Company, et al.*). See also "The Glass Industry," Department of Commerce, Washington, 1917, p. 235.

[3] List of Cases Instituted by the United States under the Federal Anti-Trust Laws, Department of Justice, Washington, December 15, 1923, p. 148 (*United States v. American Window Glass Company, Johnston Brokerage Company, et al.*).

§2. The Attitude of the United States Supreme Court

The first case to present to the United States Supreme Court the precise issue of the lawfulness, under the Sherman Act, of the establishment of a joint sales agency controlling substantially the entire output of a manufacturing industry was that of *Continental Wall Paper Company v. Voight and Sons Company*.[1] Thirty-six manufacturers of wall paper had organized the plaintiff corporation, to market their product, which amounted in the aggregate to 98 per cent of all the wall paper manufactured in the United States in the year prior to the establishment of the combination. The defendant, like other jobbers of wall paper, had entered into an agreement with the plaintiff whereby, among other things, he bound himself to maintain the prices fixed by the Continental company for resale, and to confine his purchases to the one source as stipulated. Upon being sued for the purchase price of an order of goods, the defense was set up that since the plaintiff corporation was a combination in restraint of trade and therefore in violation of the anti-trust law, the action for the purchase price could not be maintained. The Supreme Court held for the defendant, affirming the judgment of the lower court and denying recovery. The ground for the decision was that the defendant, by entering, along with other jobbers, the agreement above described, had become as much a party to an unlawful conspiracy as the members of the plaintiff corporation who had constituted the exclusive sales agency, and that the sales contract upon which suit was brought was an organic part of the unlawful agreement. The entire transaction being tinged with illegality, the assistance of the court was denied to the plaintiff corporation. For all of the producers of a commodity to erect a single concern as their exclusive sales representative is manifestly but a roundabout way of binding one another to observe a uniform, and possibly an arbitrary, scale of prices.

A variation of this kind of associative activity is illustrated by a recent case before the Supreme Court.[2] It

[1] 212 U. S. 227 (1909).

[2] *Ramsay Co. v. Associated Bill Posters of the United States and Canada*, 260 U. S. 501 (1923).

appeared that the Associated Bill Posters, a national organization of firms engaged in maintaining and leasing outdoor advertising structures, had adopted a rule forbidding members to accept contracts from foreign—that is, out-of-town—exhibitors directly, or from solicitors not "licensed" by a committee of the association. The number of such licensed solicitors had been arbitrarily limited—at the time of the action to twelve, it was alleged. On account of the injury suffered by plaintiff through a revocation of his license, suit was brought for treble damages under the Sherman Act. The court permitted recovery upon the ground that the activity of the association, as admitted by a demurrer, constituted an obstruction to the free flow of commerce, by restricting dealings in the placement of poster advertising to selected solicitors who would co-operate in maintaining and enforcing the association schedule of fixed rates and uniform commissions. Not only was the plaintiff company arbitrarily excluded from the market, by the scheme set forth, but the licensed solicitors were in effect joint salesmen for the facilities of the group. "The purpose of the combination here challenged," declared the court, "is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding non-competitive prices."[1] It is clear that such an arrangement, like the scheme for a single selling agency, would tend to result in concerted control of the marketing policies under which the entire product of the associated enterprises should be sold. The facts upon which the court gave judgment in this case showed that the power arbitrarily to determine who should sell the advertising space of the Associated Bill Posters was equivalent to the power to determine how and on what terms the entire supply should be marketed.

§3. The Economic Character of Unification in Selling

In conclusion, it may be observed that the establishment and operation of joint selling agencies is not in general undertaken by trade associations directly. The connection is

[1] *Ibid.*, p. 511.

seldom, if ever, an organic one. The association, where privy to such arrangements, acts mainly as a convenient meeting ground for negotiation; it usually stands in no more intimate relation to the birth of the agency than that of an approving god-father. It should be noted that the essential evil of the practice, so far as the law is concerned, does not consist in the fact that one concern comes to represent several producers, or even all producers, of a given commodity in the market. The basic feature of the practice which draws forth the condemnation of the law appears in the fact that the several producers agree among themselves that each will constitute the one concern its sole outlet to the market. In the former case, the entire consideration for the appointment of the exclusive agency in each instance might inhere in the superior facilities and exceptional efficiency of the marketing organization. In the latter case, at least part of the consideration for the adherence, in each instance, to the common sales agency must be presumed to lie in the fact of like action on the part of rival producers. And this mutual restraint of nominal competitors involves more than a mere restriction of competition; it appears wholly to destroy it. The parties concerned, though ostensibly independent, completely unify their interests as sellers. Within the associated group competition has not simply been abridged; the several principals cease to compete altogether and become mere producing departments for the common selling agency.

It is idle to contend that each producer is free under these circumstances to operate his plant as fully as seems desirable to him, and to accept such prices as his goods will command in the market. Prices must necessarily be uniform, and in order that this price-fixing mechanism may function effectively, and no undue advantage be taken by one producer over the others, it is essential that some control be exercised over supply. An agreement or understanding among several producers that only one and the same agency shall be empowered to make sales of the product of each cannot logically be reconciled with any other interpretation than that the selling agency is either entrusted or directed to fix an artificial price and apportion the business among the principals upon some arbitrarily agreed basis. Only such an interpre-

tation provides a rational explanation of the agreement.[1] Why else should there be joint undertaking not to sell outside the single agency? Accordingly, joint selling arrangements, and their sponsorship by trade associations, are not within the rule of reason.[2] Unification in selling is held to represent an activity wholly foreign to any sound conception of the lawful sphere of trade association work.

[1] See J. W. Jenks, "The Michigan Salt Association," *Political Science Quarterly*, Vol. III, 1888, pp. 78–98.

[2] In *O'Halloran v. American Sea Green Slate Co.*, 229 Fed. 77 (1915), the defendant in an action for treble damages under section seven of the Sherman Act was a corporation organized by "nearly all the producing companies" quarrying sea green slate to act as their exclusive selling agency. A wholesale dealer whose business was claimed to have been injured by the operation of this scheme was allowed to recover in the District Court. This judgment was reversed in the Circuit Court of Appeals, but solely on the ground of erroneous inclusion of speculative damages in the award. Notwithstanding contentions of the defendant that production had in fact been increased during its life and that prices had not been unduly raised, the District Court declared (207 Fed., 193); ". . . an agreement is within the condemnation of the act which places the power in the hands of a controlling or selling company to fix the prices to consumers and dealers of the commodity produced by those in the combination, and who had theretofore been competitors, and to sell or not to sell at all such production. . . ."

CHAPTER IV

EXCLUSION FROM THE MARKET

§1. Concert of Action and Exclusion of Outsiders

It has often been pointed out that a restraint of trade at common law might be created by erecting obstructions or hindrances against the entrance of outsiders to a trade or market as well as by agreement among those already there upon the terms and conditions according to which they would operate. The law was as much concerned that competition should not be frustrated by external pressure (against the will of competitors), as that it should not be stifled by consent (through the agreement of competitors). This aspect of the doctrine of restraint of trade found its most familiar expression in cases involving the conduct of trade unions, particularly with reference to the use of the boycott in trade disputes, but the principles established were equally applicable in the sphere of commercial affairs.[1] It needs to be noted, however, that the essential core of the doctrine, in business as in labor controversies, consisted in the element of conspiracy. In respect to restraints established by collusion among existing competitors affecting exclusively their own conduct, the fact of conspiracy is perfectly obvious. In respect to restraints enforced against the will of outsiders seeking entrance to a trade or market, the presence of the element of conspiracy is not so obvious. But legally, concert of action was equally essential in both cases. Under the Sherman Act the general doctrine of the illegality of concerted action to restrict access to a trade or market has not been seriously questioned.

The main difficulty lies in the practical application of this doctrine—in the determination of whether the facts established in any given case amount to an obstruction or control

[1] For the attitude of state courts, see: *Cleland v. Anderson*, 66 Neb. 258 (1902); *Hunt v. Riverside Club*, 140 Mich. 538 (1905); *Walsh v. Plumbers' Association*, 97 Mo. App. 280 (1902).

of entrance to the given province of business activity. If the evidence, as viewed by the courts, supports an affirmative conclusion, there appears to be no authority for the principle that the exclusion may be justified under the rule of reason. It is just here that the original doctrine of restraint of trade, technically confined to covenants not to engage in a specified business or occupation under certain conditions, is most clearly distinguishable from the conception of restraint of trade as an interference with the competitive regulation of a trade or market. Even when the two doctrines relate to substantially identical subject-matter—namely, the exclusion of some person or persons from participation in the trade or from competition in the market—different tests of lawfulness are set up. In the former case judgment rests upon an examination of the actual scope and effect of the restraint imposed, as a means of determining its reasonableness. In the latter case the restraint, reaching directly to competitive conditions, is deemed unlawful by its very existence, regardless of its concrete consequences. Concerted effort to exclude outsiders from the market is regarded by its very nature as an undue or unreasonable restraint of trade—an illegal obstruction of the free operation of competitive forces.

§2. The Nature and Methods of Exclusion from the Market

The spheres within which exclusion is attempted are, in practice, of varying compass. They range from extensive efforts to control the opening of new enterprises or the expansion of old ones over a broad territory, to petty obstruction of the activities of an obnoxious individual in a local market.[1] The occasions giving rise to the use of the practice of exclusion likewise vary. Access to the market has been denied or restricted for those members of a given trade who have failed to affiliate themselves with the association in which the predominant portion of that trade is organized.[2]

[1] Examples of the former class will be set forth below. The latter class may be illustrated by the tactics of a local hay dealers' association disclosed in *Harelson v. Tyler*, 219 S. W. 908 (Mo., 1920).

[2] *Montague v. Lowry*, 193 U. S. 38 (1904), in which the plaintiff recovered trouble damages for having his sources of supply cut off by the action of the Tile, Mantel and Grate Association of California, an organization which he had refused to join.

Occasionally, the pressure of the association is directed against "price-cutters" or those pursuing other "objectionable" practices.[1] But the situation chiefly responsible for trade association activity of this character results from attempts of outsiders to disturb the traditional channels of trade. The entrance of new firms into the special business over which a particular trade association asserts its jurisdiction is but infrequently resented, and it is generally overlooked from the standpoint of association policy. But should the new-comer, or an established firm outside the association, endeavor to extend the business in question into preceding or subsequent stages of the industrial or mercantile process, as theretofore customarily divided, the business enterprise thus exhibited is generally regarded as an "invasion" which must be repelled by the concerted action of the association membership. The great majority of the cases that have arisen involving exclusion from the market have sprung from united efforts to expel manufacturers from the jobbing trade, jobbers from the retail trade, retailers from the jobbing trade, and so on. There appears to be a strong feeling among large groups of business men that the boundaries of conventional business organization, particularly on the marketing side, are sacrosanct—that the *status quo* must be maintained at all hazards. The character of the policies resorted to for the maintenance of this *status quo* seems to involve the implication that the division of functions in the manufacturing and mercantile community is essentially an artificial arrangement which requires arbitrary measures for its preservation.

These arbitrary measures, which are designed to enforce association agreements to exclude objectionable parties from a given market, are numerous. A blacklist may be maintained, calculated to restrain association members from dealing directly with the outlaws. Equally familiar is the method of the secondary boycott—the requirement that the members of the association shall not buy from or otherwise patronize any party who deals with the person or persons to be excluded. The objectionable business unit may be in-

[1] *Mines v. Scribner*, 147 Fed. 927 (1906); *Loder v. Jayne*, 149 Fed. 21 (1907). In these cases the members of the American Publishers' Association and the National Wholesale Druggists' Association, respectively, were held liable in treble damages for having agreed to black-list price cutting dealers.

fluenced, by bribery or otherwise, to withdraw from the market "voluntarily." Denial of market facilities is another weapon; even inducements to the public not to trade with the obnoxious party may be offered. From the standpoint of legality, the method of enforcement seems to be immaterial, so long as the concerted action does tend toward exclusion. Similarly, explicit intent to exclude appears to be immaterial, provided the practice achieves or tends to achieve exclusion—the association being presumed to have intended the normal and proximate consequences of its group action.

§3. The Legal Condemnation of Exclusive Tactics

The general doctrine of the illegality of such conduct has been stated and applied in many connections;[1] but the leading case involving this issue arose from certain practices current among the lumber associations designed to maintain the established channels of trade. The Eastern States Retail Lumber Dealers' Association had devised a system for ascertaining through its local branches the names of those wholesalers who sold lumber directly to consumers. If such a wholesaler declined to discontinue the practice his name was listed in a circular sent to the members, styled the "Official Report." In practice, the distribution of these circulars was found to mean that no member of the association should buy from the wholesalers listed therein; and whether the practice of the association partook of the nature of a warning or merely of advice, the result was that purchases by retailers from these wholesalers promptly ceased. While nominally the retail dealers had liberty of action if they chose to chance the ill-will of their fellows, the court held that this arrangement amounted to a boycott and was clearly illegal.[2] It had been argued, among other things, that this activity was necessary to protect the retail trade and preserve the facilities

[1] For example, see *Loewe v. Lawlor*, 208 U. S. 274 (1908), involving a labor boycott to prevent a non-union manufacturer from selling his goods.

[2] *Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S. 600 (1914). It may be noted that upon the entry of the adverse judgment in this case pleas of *nolo contendere* were made by the defendants in several substantially identical proceedings against lumber dealers' associations in different sections of the country. See List of Cases Instituted by the United States under the Federal Anti-Trust Laws, Department of Justice, Washington, December 15, 1923, p. 89.

it furnished. The court answered tersely that "Congress with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted."[1] In other words, if the facilities of retail yards are to continue to be furnished and to flourish, it must be because they can demonstrate their competitive strength, and not because of any artificial protection accorded to them through arbitrary pressure or otherwise.

This case has been many times cited with approval, but it is not altogether clear how far the scope of the decision extends. Upon the hypothesis that the essence of the evil condemned by the court was that the public was deprived by arbitrary and artificial means of the competition of the wholesaler for its patronage in the retail market, the suggestion may be ventured that the method through which involuntary exclusion is brought about by a trade association jealous of its selected province is immaterial.

This interpretation of the Retail Lumber Dealers' Association case may be regarded as substantially confirmed by a subsequent decision of the Supreme Court.[2] A shipping "conference" known as The South African Steam Lines had been formed among the principal carriers operating vessels between the United States and South African ports. A plan was devised for excluding any non-conference ships from the traffic offered by shippers on this route. The members of the conference agreed with their patrons to refund a substantial percentage of the rate, known as a "primage charge," to such shippers as had not, during an average period of one year subsequent to any shipment upon which an adjustment was sought, patronized any other carrier of freight between the United States and South Africa. Furthermore, the appearance of competing lines was the signal for the introduction of so-called "fighting ships," which took cargoes at ruinous rates for limited consignments and at such times as were best calculated to deter the non-conference carrier from engaging in or continuing in the trade. Upon suit by a so-

[1] *Ibid.*, p. 613.

[2] *Thomsen v. Cayser*, 243 U. S. 66 (1917).

called "disloyal" shipper, from whom rebates had been withheld, to recover treble damages under the Sherman Act for injury to his trade by reason of the high rates exacted, the Supreme Court awarded judgment to the plaintiff. With regard to the exclusion tactics of the "conference" or combination, the court said: "Nor can we say that the success of the trade required a constraint upon shippers or the employment of 'fighting ships' to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the sea . . . to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the 'fighting ships.'"[1] Moreover, the court definitely rejected the contention, offered by way of justification, "that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce." The opinion clearly points out, on the contrary, that this type of concerted action does not fall within that class of business arrangements which may be justified under the Sherman Act because of the reasonableness of their nature. Much less is there any extenuation for such arrangements in the propriety of the motives actuating the parties associated with them.

More recently numerous cases involving the use of the familiar commercial boycott by trade associations for the purpose of preserving intact the established channels of trade have come before the inferior federal courts.[2] Without exception such activity has been condemned as an unjustifiable obstruction of the competitive regulation of the course

[1] *Ibid.*, p. 87.

[2] Among the more important of these cases are the following: *Southern Hardware Jobbers' Association v. Federal Trade Commission*, 290 Fed. 773 (1923); *Wholesale Grocers' Association of El Paso v. Federal Trade Commission*, 277 Fed. 657 (1922); *Western Sugar Refinery Co. v. Federal Trade Commission*, 275 Fed. 725 (1921); *U. S. v. Belfi, et al.* (Philadelphia Tile Dealers' Association), 259 Fed. 822 (1920); *National Harness Manufacturers' Association v. Federal Trade Commission*, 268 Fed. 705 (1920); *Knauer, et al.* (National Association of Master Plumbers) *v. U. S.*, 237 Fed. 8 (1916); *U. S. v. Associated Bill Posters*, 235 Fed. 540 (1916); *U. S. v. King, et al.* (Aroostook Potato Shippers' Association), 229 Fed. 275 (1915); *Hale v. Hatch & North Coal Co.* (Hartford Coal Association), 204 Fed. 433 (1913). The first four of the cases listed arose under Section 5 of the Trade Commission Act prohibiting "unfair methods of competition." It does not appear, from the tenor of the opinions in these cases, that the law with respect to these activities prevailing prior to 1914 has been materially altered by the enactment of this prohibition.

of trade. The facts of one of these cases are typical. The Philadelphia Tile Dealers' Association had instituted a boycott scheme to compel manufacturers to restrict their sales of tile in that city to members of the association, all of whom were pledged to conduct their business on preconcerted terms. Upon indictment, the members principally responsible for the arrangement were held criminally liable, and fines and sentences were imposed.[1] It is clear that there can be no justification, no excuse under the rule of reason, for members of a trade association engaging in any activity calculated either to restrict the number, or to discriminate with regard to the character, of persons entering a given branch of commerce or industry.

Of a like order with these arrangements is the practice, formerly more resorted to than in recent years, of apportioning territory among the members of the association. This is only another way of excluding some persons from a designated market, even though it be with their consent. Such arrangements, whereby independent and nominally competing concerns mutually agree that each will not encroach upon the market area allocated to others of their number, are as clearly in violation of the anti-trust laws as joint efforts to keep outsiders from their self-determined province of trade.[2] Agreements to divide territory may, it is true, leave some competition in the field, either among the members of the association, in so far as more than one is permitted to operate in a designated area, or between the association member to whom the territory is assigned and independent concerns which continue to conduct business there. Furthermore, the possibility of new competition is always present. But neither actual competition, nor potential competition, nor both together, can operate to remove such arrangements from the prohibition of the law. It is sufficient that, as among the parties, there is agreement not to compete.

The very first Supreme Court decision under the Sherman Act condemning a combination of strictly industrial concerns involved this question of a territorial division of busi-

[1] *U. S. v. Belfi, et al.*, 259 Fed. 822 (1920).

[2] In this respect the law in most state jurisdictions is in full accord with the federal law. A significant case is *Morey v. Paladini*, 203 Pac. 760 (Calif. 1922).

ness.[1] Among the devices used by the association of cast iron pipe manufacturers whose activities were the subject of the Addyston Pipe case was an agreement assigning the business of private and municipal gas and water companies in certain cities to particular members. The selected member became entitled to all the business originating in the specified locality, to the exclusion of all other members of the association. Since an appearance of competition was necessary, it was provided that upon calls for sealed bids from these places, all parties should confer with the member to whom the particular city was "reserved," and should then submit bids higher than his, whatever that might be. On the basis of this activity, as well as other features of its program, the association was held to be unlawful and a decree of dissolution was entered against it. Similarly, the practice of joint division of territory was one of the activities of the gunpowder trade association which led to an adverse judgment in the prosecution of Du Pont de Nemours and Company.[2] In like manner, also, the agreement among the members of the National Window Glass Jobbers' Association that each would confine his sales to a definite segment of the market mutually marked out was one of the principal grounds for recovery of treble damages from the organization as an unlawful combination.[3]

In general the illegality of this practice has been so clearly established that associations which have attempted it have kept the arrangement a close secret, and the recorded cases touching this type of activity have latterly been infrequent. No serious contention has been made, since the Addyston Pipe prosecution, that the practice may be under some circumstances defensible.

[1] *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211 (1899).

[2] *U. S. v. E. I. Du Pont de Nemours & Co.*, 188 Fed. 127 (1911).

[3] *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Association*, 152 Fed. 864 (1907). See also: *Leonard v. Abuer-Drury Brewing Co.*, 25 App. (D. C.) Cases 161 (1906); *U. S. v. American Seating Co.* (Aug., 1907). Decrees and Judgments in Anti-Trust cases, Washington, 1918, pp. 145–149.

CHAPTER V

CURTAILMENT OF PRODUCTION

§1. Illegality of Agreements or Understandings to Curtail Production

It is a commonplace of economic analysis that the primary source of the monopolist's power over price is to be found in his control of supply. While the character of the demand for his commodities or services, which is largely dependent upon external factors beyond his control, imposes well-defined limitations upon the arbitrariness with which his price-fixing power may be exercised, he is enabled, through control of supply, to establish prices which will yield the highest net return. Such prices are monopolistic prices.

It has long been accepted as a cardinal principle of the public policy embodied in the anti-trust laws that agreements designed to restrict production or to limit the supply of any commodity or service directly and arbitrarily are illegal.[1] Such joint curtailment of output has been deemed to be by its very nature an undue or unreasonable restraint of trade. And in recent years the condemnation of the law has been extended to concerted action calculated to regulate production, in the absence of either a monopolistic combination, or any express agreement to that end among the independent competitors under attack.[2] In the Hardwood Lumber case the illegality of the association was found to depend not only on its use of open-price machinery, but on the persistent policy which was disclosed of suggesting, advising, and exhorting a curtailment of output. It would appear, therefore, that the circulation by a trade association of literature calculated and actually tending to induce members individually to restrict their production may, even in

[1] *Cravens v. Carter-Crume Co.*, 92 Fed. 479 (1899); *Gibbs v. McNeeley* (Washington Red Cedar Shingle Manufacturers' Association), 118 Fed. 120 (1902).

[2] *American Column & Lumber Co. v. U. S.*, 257 U. S. 377 (1921); *State v. Arkansas Lumber Co. et al.*, 169 S. W. 145 (Mo., 1914).

the absence of express agreement, be held to violate the prohibitions of the anti-trust laws. This extension of the doctrine that concerted action to control supply is illegal will be subjected to further analysis in subsequent pages; but the general principle from which it proceeds appears to be well-established, and to be grounded in sound public policy.

In the very recent decision of the United States Supreme Court with regard to the validity of the employment agreement in the hand-blown window glass industry, some doubt seems to have been cast upon the doctrine that concerted action to curtail production is absolutely illegal.[1] The court was called upon to determine the legality, under the Sherman Act, of an agreement between the manufacturers of hand-blown window glass, represented by the National Association of Window Glass Manufacturers, and the skilled employees in that field, represented by the National Window Glass Workers, whereby it was provided that no factory should be operated for more than about four and a half months between September 25, 1922, and September 25, 1923. Indeed, the particular dates between which each plant might be run were expressly stipulated. While these facts alone would seem to reflect an arrangement to restrict production, the agreement was upheld by the court, on the basis of the special conditions prevailing in the industry. It appeared that the supply of skilled labor was insufficient to provide a full force for all the factories at any one time, that the plants could not profitably be operated when undermanned, that there was no likelihood of an increase in the labor supply (since machine-made glass was steadily superseding hand-blown glass), and that the price of window glass was predominantly determined in the market by the manufacturers of the machine-made product. Under these circumstances, this arrangement, which was clearly beneficial both to the workers and to the manufacturers, was not regarded by the court as one calculated to curtail production or to enhance prices. Accordingly, the petition of the Department of Justice was dismissed.

The opinion of the Supreme Court, delivered by Justice

[1] *National Association of Window Glass Manufacturers et al. v. U. S.*, 263 U. S. 403 (1923).

Holmes, was very brief, and its emphasis was placed exclusively upon the special circumstances surrounding the agreement. In the light of the peculiar facts disclosed, the judgment may be ventured that the decision cannot be taken as authority for the proposition that a trade association may regulate the total output of an industry, provided it does not immoderately curtail the supply. The manufacturers did not directly, and solely amongst themselves, stipulate a definite working period for each factory. Such an agreement would have been plainly a mutual restraint upon trade and therefore illegal. The arrangement here involved was part and parcel of a general employment agreement, the character of which was moulded by extraordinary circumstances. Since collective bargaining has long been sanctioned by the law, in both state and federal jurisdictions, and the limits of the conditions in a trade or industry that may thus be regulated have never been precisely fixed, the court was presented with the novel issue of determining whether there was connivance between employers and employees to obstruct the freedom of interstate trade by agreeing upon mutually advantageous terms for the curtailment of output. Upon a review of all the facts, the court found that the arrangement disclosed no such illegal purpose or restrictive policy. But there appears to be nothing in the case from which can be drawn the conclusion that the courts are inclining to adopt a more tolerant attitude toward associated efforts directly and primarily bent upon the control of output or the manipulation of supply. There appears to be no disposition to bring such arrangements within the flexible limits of the rule of reason.[1]

§2. Interchange of Information and Opinion and Restriction of Output

While the general principle that express agreements among competitors designed to curtail production are unlawful

[1] Critics of this decision have suggested that there is a simple and sufficient answer to the various defenses offered by the association. They argue as follows: When it was contended that a factory could not profitably be operated at less than full capacity, the court might well have inquired what stood in the way of the defendant manufacturers bidding against one another for the services of skilled artisans until some secured an adequate force and others were constrained to drop out of an industry in which they were incapable of competing successfully.

represents settled doctrine, the recent extension of the rule, whereby such concerted intent may appear to be presumed from the mere exchange of business information which leads to individual restriction, or from the mere exchange of business opinion, within any particular trade or industry, leading to a like result, is deserving of further attention. In the absence of agreement or understanding to restrict output, the interchange of general production and stock data by members of a trade association is but calculated to rationalize independent market conduct. Such a rationalizing procedure, if unabused, tends to render the competitive process more effective, rather than to subvert it; it enables competing concerns to order their production policies intelligently, on the basis of economic fact, rather than blindly, on the basis of mere hearsay or guesswork. And this is desirable from the public standpoint, as well as in its private business aspect; for it serves to mitigate the dangers of misdirected production and to stabilize economic conditions.

In like manner, there can be nothing improper in an endeavor by one interested in a given branch of industry to obtain the judgment of a rival upon what constitutes a sound production course in any exigency, or even in an attempt to influence a fellow tradesman so to act as to create a better market for one's own product. Common counsel, in business as elsewhere, is useful and enlightening, and each individual business unit may secure such advice and exert such influence as tends to promote its own separate interest. The advice given must not involve the circulation of false information among competitors calculated to deceive them concerning the real condition of the trade. The influence exerted must not involve the giving and taking of reciprocal engagements calculated to result in uniform policies. But the implication sometimes drawn from decisions such as that in the Hardwood case, that men of business may not, without being presumed to be violating the law, meet and discuss the conduct of the trade or industry with which they are concerned,[1] seems quite unwarranted.[2] While such common counsel

[1] *U. S. v. Maple Flooring Manufacturers' Association*, U. S. District Court, Western District, Michigan, January 4, 1924.

[2] Cf. opinion of Supreme Court in reversing this judgment, *Maple Flooring Manufacturers' Assn. v. U. S.*, Docket No. 342, June 1, 1925.

may, as will be noted presently, readily lead to a tacit understanding to pursue a uniform policy, it does not, in and of itself, constitute a departure from sound business practice or involve a violation of law. Communications made in good faith, and expressing the mere opinion, advice, or individual judgment of the person or persons responsible for them, do not, as such, interfere with the free functioning of the competitive process.

§3. The Attitude of the Law

The ban of the law appears to be directed neither against the mere interchange of information, nor against the mere exertion of influence by one business man upon another, provided genuinely independent production policies are pursued. But common understandings to regulate production, however loose and informal, are as clearly in contravention of law as express agreements designed to achieve the same end. These common understandings may be deduced from the system of reporting involved in the collection and dissemination of statistics, from the nature of the comment or advice accompanying the data furnished to the individual concerns, or from the character of the mutual counsel made available at the meetings or conferences of the trade association. The essential element of the wrongful conduct consists in the offer and acceptance, by members of a trade association, of reciprocal engagements with regard to their respective production policies. Even though these engagements may merely be assumed to exist by a reasonable inference because of the uniform action of the associates, they amount in law to the exaction of a promise for a promise. They comprehend every essential element of a contract, save a lawful object; and the restraint upon trade resulting from them is palpable. In conclusion, it should be reiterated that the give and take of opinion and advice among business men in any line of trade is not in itself unlawful. The subordination of this legitimate process of assistance to an illicit scheme of mutual aggrandizement must be clearly established, before association activity in this direction is condemned.

CHAPTER VI

PRICE MANIPULATION

§1. Illegality of Outright Agreements to Fix Price

Under the competitive organization of industry, the free operation of the price-fixing mechanism is indispensable to the proper utilization of economic resources and to the effective protection of the consuming public against private exploitation. The character and direction of industrial activity are moulded through the medium of prices. In the long run, the market values of the great variety of commodities and services offered in exchange serve as an automatic guide for the allocation of capital investment, the distribution of labor power, and the application of business enterprise. Indeed, the private ownership and operation of the means of production in the manufacturing industries is rendered an instrument of public welfare only in so far as genuinely independent rivalry among both producers and consumers is effectively maintained in terms of price. The general tendency of the price of freely reproducible goods to approach cost of production is dependent, basically, upon the maintenance of open markets and the unhampered adjustment of values in conformity with the prevailing conditions of supply and demand.

Under the complexities of modern industrial society, however, there are numerous factors which obstruct, if they do not entirely subvert, these spontaneous adjustments. We are here concerned only with such obstruction of the competitive process as results from conscious co-operation in price-making among nominally independent producers or sellers, particularly as it manifests itself through the activities of trade associations.

In the evolution of public policy toward business co-operation, there has been full recognition in the law of the basic importance, under a system of private property and

individual enterprise, of an open market for the free determination of prices. No feature of the competitive process is more jealously guarded against subversion than that of price-making. Economic doctrine and legal principle are in fundamental agreement in this regard. It is not now open to question that any arrangement or agreement among the members of a trade association looking to the establishment of a unified policy in fixing the prices to be charged for their goods or services is illegal. Such concerted price determination is illegal without regard to the reasonableness of the charges agreed upon. It is illegal, too, without regard to the extent of membership in the association and without reference to the presence or absence of actual or potential competition outside the association. Moreover, legal condemnation is encountered even if the joint action does not touch the whole of the final price, but only some component element thereof. In short, a trade association cannot engage in any practice tending directly to restrict or limit price competition within the industry without contravening the prohibitions of the anti-trust laws.

Nevertheless, there is no other activity for which trade organizations have been so frequently cited before the courts. It formed the basis of the first recorded proceeding under the Sherman Act,[1] and prosecutions for price manipulation are pending against trade associations today.[2] In a long series of decisions, the courts have condemned a wide variety of devices designed to maintain or enhance prices.[3] Whether in the form of a simple agreement to abide by a stipulated

[1] *U. S. v. Jellico Mt. Coke & Coal Co.*, 43 Fed. 898 (1890), 46 Fed. 432 (1891), in which the Nashville Coal Exchange was enjoined from fixing the prices at which coal should be sold in that city.

[2] See List of Cases Instituted by the United States under the Federal Anti-trust Laws, Department of Justice, Washington, December 15, 1923. For example, *U. S. v. Trenton Potteries Co.* (p. 151); *U. S. v. American Window Glass Co., Johnson Brokerage Co., et al.* (p. 148).

[3] *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *U. S. v. Joint Traffic Association*, 171 U. S. 505 (1898); *U. S. v. Coal Dealers' Association of California*, 85 Fed. 252 (1898); *Lowry v. Tile Mantel & Grate Association*, 106 Fed. 38 (1900), affirmed (*Montague v. Lowry*) 193 U. S. 38 (1904); *Gibbs v. McNeeley* (Washington Red Cedar Shingle Manufacturers' Association), 118 Fed. 120 (1902); *Ellis v. Inman, Poulsen & Co.* (City Retail Lumber Co.), 131 Fed. 182 (1904); *U. S. v. Swift & Co., et al.*, 196 U. S. 375 (1905); *U. S. v. E. I. Du Pont de Nemours & Co.* (Gun-powder Trade Association), 188 Fed. 127 (1911); *Standard Sanitary Manufacturing Co. v. U. S.* (*Bath-tub Pool*), 226 U. S. 20 (1912); *Thomsen v. Cayser* (Shipping Conference), 243 U. S. 66 (1917); *U. S. v. Trenton Potteries Co., et al.*, 1923.

scale of prices,[1] or in the form of an elaborate mechanism of licenses, graduated royalties and penalties, arrangements of this character have been held illegal.[2] Moreover, the absolute prohibitions of the law in this matter have given the quest for price-fixing activity special prominence in the antitrust investigations of the Department of Justice. The first line of attack, in practice, has been directed toward the ascertainment of whether there has been any undertaking, recorded or unrecorded, to observe uniform prices. If such an undertaking is established, all else becomes secondary.

§2. Agreements Upon Specific Elements of Price

Less obvious in its destructive effect upon competition than outright price-fixing through concerted action, but none the less genuinely significant from the standpoint of public policy, is the fixation of some component element of price through mutual agreement or understanding. Price represents the power of an economic good to command other goods—that is, its value in exchange, measured in terms of money. The production of most goods necessitates the utilization of a wide range of materials and services. The price of a commodity, therefore, in so far as it is dependent upon costs of production, may be viewed as the pecuniary expression of the value of a group of elements; material, labor, planning, risk, transportation, and the like. The outcome of competition between rival concerns may depend upon their comparative advantages in any of these directions. Concerted action resulting from agreement with respect to any of these specific elements that tend to influence price may thus serve to hinder the free functioning of the competitive process in the adjustment of market conduct. Accordingly, while such action may not altogether preclude the competitive regulation of an industry, it is nevertheless deemed illegal as an unreasonable restraint of trade.

The several variations of such agreements have not been thoroughly explored in the courts. The familiar types relate to the fixation of a uniform percentage of profit over manu-

[1] *Gibbs v. McNeeley*, 118 Fed. 120 (1902).

[2] *Standard Sanitary Manufacturing Co. v. U. S.*, 226 U. S. 20 (1912).

facturing cost or purchase price, the adoption of uniform cost entries for overhead, the substitution of an arbitrary charge for actual expense incurred with respect to some productive process or incidental service. But the possible modes of restraint may, of course, be as varied as the elements which make up price. Restrictions of this character have from time to time been identified with trade association work.[1] Sometimes these restrictions have come about in connection with strenuous efforts to stimulate the use of cost accounts. These campaigns have usually been characterized by a special emphasis upon the advantages of the adoption of a uniform system of cost accounting throughout each industry or trade. This emphasis springs mainly from an appreciation of the greater utility of cost computation under these circumstances, no doubt, but in part also it may be traceable to the added effectiveness of a campaign in which attention is centered upon a single, concrete system. There is no reason to complain of this emphasis so long as it is confined to the advocacy of uniformity in methods of accounting. But, in practice, it is an easy transition to encouragement of uniform entries in accounts, or stipulation of procedure which will give uniform results.

No case directly turning upon the interchange of cost data has yet been adjudicated by the courts.[2] General appreciation of the advantages to be derived from careful cost finding, and of the power flowing from agreements to fix cost elements arbitrarily, is of comparatively recent development. But latterly cases of this type have come before the Federal Trade Commission, and the practice has been considered by the Department of Justice in formulating consent decrees. One of the most instructive proceedings upon this matter was originated by a complaint of the Federal Trade Commission against the United Typothetæ of America.[3] This association of job printers inaugurated a campaign

[1] Consult Federal Trade Commission, "Report on Household Furnishings Industries," Washington, 1923. Vol. I, pp. 224–240; Vol. II, pp. 94–96, 108–112.

[2] Cf., however, *Maple Flooring Association vs. U. S.*, Supreme Court, October Term, 1924, Docket No. 342. Decided June 1, 1925. In this case the defendant had compiled and distributed average costs for specified products, including arbitrary estimates of certain elements of cost. This fact alone was held not to evidence a violation of the Sherman Act.

[3] *Federal Trade Commission v. United Typothetæ of America*, Complaint No. 459, filed September 25, 1919, decided August 17, 1923.

designed to furnish the members not only with expert technical advice, but also, the Commission found, with specific data for entry upon certain items of expense and with average production costs for various types of commercial printing. These data were supplied in a booklet known as the "Standard Guide," which was compiled by the price list committee of the United Typothetæ and currently revised. It was found also that the adoption of uniform percentages of profit over ascertained costs was advocated or suggested. Accordingly, an order to cease and desist was entered.[1] The association appealed from this ruling, but the appeal was subsequently withdrawn upon an understanding being reached with the Commission. It should be noted, however, that so far from condemning instruction in cost accounting or the utilization of a uniform system of cost computation, the Commission took occasion, in a letter to the association interpreting its order, to state: "The Federal Trade Commission has a number of times gone on record as approving the efforts of trade associations to inculcate in their members a recognition of the necessity of proper cost accounting as essential to the conduct of business, and endeavored in making its order in this case to leave the cost accounting work of the United Typothetæ of America in its educational phase fully undisturbed . . . those practices which were under review and which were reached by the Commission's order were those which culminated in a series of items capable of being translated by a mechanical process into a uniform selling price and it was this system to which the order in question was directed."[2]

The attitude of the Department of Justice toward such association activity was manifested as early as 1917 in a consent decree which it secured from the Woven Label Manufacturers' Association.[3] The prosecution was predicated, among other things, on the use by the members of a

[1] For vigorous criticisms of the Commission's findings and order, see *Typothetæ Bulletin*, Vol. XVII, no. 23, September 3, 1923; *Typothetæ Bulletin*, Vol. XVII, no. 25, September 17, 1923.

[2] The letter, dated December 31, 1923, is reproduced in full, together with a statement of the Typothetæ's view of the case in the *Typothetæ Bulletin*, Vol. XIX, pp. 195–197, August 11, 1924.

[3] *U. S. v. Kluge et al.*, "Decrees and Judgments in Federal Anti-Trust Cases," Department of Justice, Washington, 1918, pp. 631–634.

schedule of costs which set forth the exact amounts to be reckoned as items of expense in connection with certain processes as a basis of computation of total cost. The total cost thus arbitrarily built up was used, in turn, as a basis for the determination of selling price. The association was required to be dissolved.

More recently, in a petition for a decree of dissolution against the Southern Pine Association, the defendants were charged with having established as a minimum selling price basis the average cost of production disclosed by the compiled cost figures of its members. This proceeding, which was initiated early in 1921, is now pending in the United States District Court for the Eastern District of Missouri.[1] In like manner, the members of the National Coal Association were indicted in 1921 for having, among other things, adopted and put into use a uniform cost accounting system which specified arbitrarily certain items of cost.[2] These proceedings reflect the views of the Department of Justice upon trade association activity of this character.

While the legality of an agreement to fix arbitrarily and on a uniform basis some inconstant element of cost is technically open before the courts, the logic of the rule against price-fixing may eventually lead to judicial condemnation of the practice. For price is, in most instances and under normal conditions, but the sum of a number of items of cost. At any rate, competitive prices are unquestionably influenced in the long run, by costs of production. Real competition tends to reduce prices, by exerting a downward pressure upon costs all along the line. Agreements that certain elements of cost shall be relieved from this pressure seem logically to fall within the prohibitions of the Sherman Act.

But this doctrine does not necessarily involve condemnation of trade association activity designed to promote the use of standardized systems of cost accounting. That is quite another matter and is properly free from legal interference. The line of demarcation between the legitimate promotion of cost accounting practice and its subversive use

[1] *U. S. v. Southern Pine Association et al.*, List of cases Instituted by the United States under the Federal Anti-Trust Laws, Department of Justice, Washington, December 15, 1923, p. 136.

[2] *U. S. v. Jones et al.*, *ibid.*, p 136. This case was dismissed June 28, 1923.

as a means of stimulating uniform price policy is quite apparent, and it has been clearly drawn by the Government.[1]

§3. Informal Understandings on Price Policy

Thus far the discussion has been concerned primarily with explicit agreements, contractual in form, to maintain prices or to fix cost elements of prices. But outright agreement is frequently lacking. There are other, less direct, modes of approach to this same end of manipulating prices. In the proceeding against the United Typothetæ, involving alleged abuses of a uniform cost accounting system, no definite undertaking to substitute arbitrary figures for inconstant elements of cost or to pursue a uniform price policy was established. Similarly, in governmental attacks upon the use of the so-called "open price plan," the members of trade associations are not generally found to have bound themselves to subordinate their independent judgment to the will of the group. In both cases the element of agreement emerges through implication. Such concert of action as is found to follow or as is deemed to constitute a necessary effect of the arrangement, is dependent almost exclusively upon the mere interchange of information or of common counsel. Are these frailer "understandings," involving an actual or potential tendency to price manipulation, equally forbidden by law? Recent controversies have shed considerable light upon this problem.

[1] In the correspondence between Secretary Hoover and Attorney-General Daugherty upon the activities of trade associations, the first query of the Secretary of Commerce, in his letter of February 3, 1922, related to the promotion of uniform cost accounting systems. The query was worded with due appreciation of the distinction between legitimate and illegitimate practice in this regard. Secretary Hoover wrote: "May a trade association provide for its members a standard or uniform system of cost accounting and recommend its use, provided that the costs so arrived at by the uniform method are not furnished by the members to each other or by the members to the association and by the latter to the individual members?" To which the Attorney-General replied, under date of February 8, 1922: "With reference to the first paragraph, there is no apparent objection to a standard system of cost accounting, but I think associations should be warned to guard against uniform cost as to any item of expense. For illustration, a strong effort has been made by some lumber associations to take as a basis for estimating costs of production a uniform charge for stumpage. Of course the cost of the timber in the tree to the different manufacturers who own their timber in the woods greatly varies; and as to each it should be charged at its actual cost." And after declaring such practice illegal, as quoted above, he added: "It has been ascertained that the members of one association go so far as to fix a uniform cost price, leaving to each member to determine what per cent profit he will add, thus eliminating entirely competition in so far as affected by the cost of production."

In the Steel Corporation case, although the chief issue involved was the legality of the combination by which the United States Steel Corporation was constituted, the relationship of the price policy of the corporation to that of the "independents," so-called, was subjected to careful judicial scrutiny.[1] The court found that while "the power attained by the corporation was much greater than that possessed by any one competitor, . . . it was not greater than that possessed by all of them."[2] But it appeared that there had been, at one time or another, methods of co-operation among steel manufacturers aimed at the maintenance of prices, in which the defendant corporation participated. In the absence of monopoly, efforts to "stabilize" prices had proceeded, the court found, through "pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of law, but transient in their purpose and effect."[3] All of these methods of co-operation "after instances of success and failure" had been abandoned by the corporation sometime before the suit was brought and there was no "evidence of an intention to resume them."[4] These methods were, nevertheless, condemned;[5] but, since monopoly was not achieved, the bill was dismissed as to the substantial relief sought. The District Court offered to retain it, "for the purpose of restraining any similar movement (co-operation looking to price stabilization) by the defendants that might be contemplated hereafter." This offer the Government did not accept.[6]

The District Court found that at the "dinners" referred to there were no "agreements made concerning prices at which the participants would sell their products, . . . but in lieu of agreements the parties, both at the dinners and at the committee meetings, severally made what they chose to call 'declarations of purpose'—that is, declarations of the prices at which they respectively proposed to sell their products, to which prices it is testified all adhered until some one chose to deviate therefrom, in which event he was 'in decency'

[1] *U. S. v. United States Steel Corporation*, 223 Fed. 55 (1915); affirmed 251 U. S. 417 (1920).

[2] 251 U. S., 444. [3] 251 U. S., 445.

[4] 223 Fed., 178; 251 U. S., 445. [5] 251 U. S., 445. [6] 251 U. S., 445.

bound to notify his dinner associates or members of his committee."[1] The understandings at these dinners, declared the District Court, "differed from pools only in the difference between the binding force of moral understanding and the legal obligation of an express agreement. They were pools without penalties, they constituted a scheme which did not make it fatal for a competitor of the corporation to stay out, but made it attractive for him to stay in, the result of which was that prices were maintained in greater uniformity and stability than when the same participants engaged in pool agreements, violations of which carried penalties."[2] The Supreme Court took the same view.

It is clear that implied understandings to fix prices may be as unlawful as express agreements, the form of the arrangement and the presence or absence of penalties for its breach being immaterial. Any real co-operation in the direction of fixing prices, any evidence of a meeting of minds upon prices to be charged, will serve to stigmatize the relation of the interested concerns as illegitimate and unlawful. Uniformity of price policy may in and of itself afford ground for suspicion. If such uniformity is found to result from joint understanding, there appears to be ground for prosecution.

§4. Open-Price Arrangements

This doctrine was confirmed by the Supreme Court in its far-reaching decision in the Hardwood Lumber case.[3] The facts upon which the court based its decision were relatively simple and, in most respects, undisputed.

The members of the Hardwood Lumber Manufacturers' Association, comprising 365 separate and independent concerns, operating mills in eighteen states, chiefly in the southwest, and controlling, in the aggregate, about one-third of the total production of hardwood in the United States, entered upon a scheme of co-operation styled the "Open Competition Plan." This plan adopted by the association required each member to submit: (1) daily sales reports, including names and addresses of buyers and all terms and conditions of each transaction, being "exact copies of orders taken"; (2) daily shipping reports, including exact copies of

[1] 223 Fed., 174. *Idem.*

[3] *American Column & Lumber Co. v. U. S.*, 257 U. S. 377 (1921).

invoices and all special terms agreed upon; (3) monthly reports of production, classified according to grade and thickness; (4) monthly reports of stocks on hand, classified according to grade and thickness, and as sold or unsold, green or dry; (5) monthly price lists as of place of shipment, new prices to be filed as made. This information was to be compiled and interpreted by the official in charge and to be communicated to the members. In addition, the Manager of Statistics was required to send each member a monthly "market report letter," and monthly meetings were to be held for the purpose of discussing the trend of business and "all subjects of interest to the members." In practice the comments of the Manager of Statistics, dealing with current conditions and the outlook for the future, were not confined to the market letters; they were also contained in the weekly sales reports, and thus reached the members very frequently. These comments, by way of interpretation of the data distributed among the associates, often stressed the evils of overproduction, counseled the desirability of restricting supply, and suggested methods of procedure calculated to maintain prices. Before each meeting questionnaires were sent to all the members, and the replies received, analyzed and interpreted by the statistician were distributed among the members and served as a basis for the discussion of current and prospective market conditions. While the regular reports contemplated by the "Plan" were confined to closed transactions, some of the information sought in these questionnaires, the comments contained in the market letters and the sales reports, and the subject-matter of the discussions at the association meetings touched directly upon future policy.

The court saw in this arrangement a tacit understanding among the members of the Hardwood Lumber Manufacturers' Association to pursue a concerted price policy. In spite of the absence of express agreement or palpable coercion, the open-price machinery was regarded primarily as a device to achieve joint curtailment of production and unified control of price, and was held to constitute no less a violation of the Sherman Act than other price-fixing devices. The court said:

"Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a 'harmonized' estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a 'new form of competition' and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn, as an old evil in a new dress and with a new name."[1]

The decision in the Hardwood Lumber case evoked a storm of protest in the business world. While the illegality of price manipulation was everywhere conceded, it was felt that the basis of "agreement" or "understanding" disclosed in this litigation was an extremely tenuous one, and that the sweeping dicta of the court might tend to jeopardize the legitimate statistical activities of trade associations. Under these circumstances it is highly significant that in the Linseed Oil case, decided two years later, the Supreme Court, in reviewing the grounds of its condemnation of open-price activity, maintained its original position in every essential respect.[2]

[1] *Ibid.*, p. 410. A minority of three justices—Holmes, Brandeis, and McKenna—dissented from the decision of the majority of the court. Justice Brandeis argued forcefully against condemning a combination of this character, in the absence of clear proof of public detriment. But it is worthy of note that in the American Linseed Oil Company case, decided two years later, the decision of the court condemning an open-price plan upon somewhat similar facts was unanimous. 262 U. S. 371 (1923).

[2] *U. S. v. American Linseed Oil Co.*, 262 U. S. 371 (1923).

The facts in the case of the Linseed Crushers' Council did not differ fundamentally from those in the earlier case. While the open-price machinery was organized and conducted by men outside the trade, operating under the designation of the Armstrong Bureau of Related Industries, it functioned in substantially the same manner as the central office of the Hardwood Lumber Manufacturers' Association. Twelve corporations, engaged as independent competitors in the business of manufacturing and selling linseed oil, cake, and meal, and producing and distributing a large proportion of the linseed products consumed in the United States, entered into a "subscription agreement" with the Armstrong Bureau providing for the prompt interchange of comprehensive and accurate data relative to the manufacturing and marketing conditions of the industry. There was provision for examination by the Bureau's auditor of "all vouchers, books of account, correspondence, and such other evidence or documents as he may request," and for the deposit by each subscriber of Liberty Bonds, from one thousand to ten thousand dollars in amount, to be forfeited for his failure, "in any manner whatsoever, to comply with any of the terms of this agreement or with any and all reasonable requirements" of the Bureau. There were also monthly meetings of the subscribers, under the direction of a representative of the Bureau. All information received from the Bureau or in connection with the meteings of the subscribers was deemed confidential.

A significant difference between the Hardwood case and the Linseed case consisted in the fact that in the later controversy the central office indulged in no comment or advice upon the meaning or use of the data which it compiled and distributed among the associated subscribers. But the sweeping commitments of the associates in the Linseed case, vigilantly enforced by an outside agency under binding sanctions, were declared by the court to provide ample basis for the finding of an agreement or understanding to restrain trade.

Taken together, these two cases seem to leave no room for doubt that the so-called open-price system, as exemplified in the procedure of these associations, contravenes the Sherman

Act. When the burden is assumed by every member of such an open-price association to report prices quoted and received by him, to disclose not only the aggregate volume of his sales, but the amounts involved in individual transactions, and to lay bare other intimate details of his business, this does not reflect normal competitive conduct. Rather, as the Supreme Court declared in the Hardwood case, it is clearly the conduct of "men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide." Moreover, when the information thus collected and disseminated through these open-price bureaus is not published, buyers tend to be deceived as to the essential independence of the various sellers with whom they are dealing, to the distinct market advantage of the associates in open-price arrangements. Under these influences, according to judicial opinion, the free operation of competitive forces is unduly obstructed.

§5. Price Manipulation and the Interchange of Trade Statistics

But in the absence of express contract or tacit understanding to pursue common business policies, the collection and dissemination of market data by trade associations appears to constitute a wholly legitimate function, as will be shown in a subsequent chapter. Under these circumstances, the Hardwood and Linseed cases manifestly imposed upon the leaders in the trade association movement the responsibility of finding means of reconciling the promptings of economic principle and business experience, on the one hand, with the requirements of the law, on the other hand. For their conflict was, evidently, only seeming. There were certain features of the organization and operation of the Hardwood Manufacturers' Association and the Linseed Crushers' Council which were not essential to the utility or fruitfulness of the statistical services of such associations. If by the elimination of these features the interchange of trade statistics could not be saved, then it seemed clear that the solution of the problem must rest upon the government.

This much was settled, however: the exertion of a concerted influence upon prices by ascertaining a consensus of

opinion among an assembly or association of sellers, even when the basis of such opinion or tacit understanding is found in a series of past transactions, is not permissible under the anti-trust laws. There is no prospect that the courts will change their attitude towards arrangements of this character. They are in the same category, both in law and in fact, as explicit price agreements. They tend to the establishment of uniformity of policy. They interfere with the spontaneous functioning of independent business units. They destroy genuine competitive rivalry. The courts look no further.

PART III: ASSOCIATION ACTIVITIES AND THE REGULATION OF COMPETITIVE CONDITIONS

CHAPTER VII

OPERATION OF EXCHANGES

The foregoing discussion has dealt with such trade association activities as tend to suppress competitive conditions. Unification in selling, joint action directed to the exclusion of outsiders from the market or to the delimitation of market areas, agreements or understandings designed to curtail production, and concerted influence upon price or any of its elements, including that which emerges from so-called open-price operations, have been held to abrogate the rule of competition and necessarily to restrain and obstruct the free flow of commerce which it is the purpose of the law to foster and protect. Whether or not they are instituted with a prime regard for the public weal, and whether or not they are exercised with moderation, these activities contravene the settled policy of the law, and they are accordingly condemned.

An attempt will now be made to appraise the economic significance and legal status of association activities which tend on the whole to regulate competitive conditions rather than to suppress them. Normally, the primary objective of co-operative effort in these directions is to promote trade, for the community at large as well as the individual associates, by facilitating the removal of those obstacles to economic efficiency and industrial stability which spring from the pursuit of unco-ordinated competitive enterprise, by establishing business relationships conducive to intelligent and orderly competition. But such regulation of competitive conditions may be abused—it may bind the freedom of the associates unduly, it may obstruct spontaneous business adjustments unreasonably. These activities, therefore, fall within a twilight zone: a region of associated action in which the law accords approval or enforces condemnation according to the intent and character of the restraint and the actual or probable consequences of the joint

action in the special circumstances of each particular case. This is the field of "the rule of reason."

The following activities may be deemed representative, if not exhaustive, of this category of trade association functions: (1) operation of exchanges, (2) collection and dissemination of trade statistics, (3) interchange of patent rights, (4) interchange of credit information, (5) negotiation of purchases, (6) standardization of products, (7) development of business standards. These activities, it is apparent, aim, for the most part, to utilize the trade association as a clearing house of knowledge and information and experience, for the common benefit of the industry as a whole, and to mitigate the flagrant maladjustments which have emerged from unrestrained competitive rivalry. Not all of these activities are universally or even commonly pursued among trade associations; but all of them have engaged the attention of the Department of Justice and the courts in recent years. It is the purpose of this chapter to examine the character of these activities and to analyze their status under the anti-trust laws.

§1. The Relationship Between Open-Price Associations and Exchanges

There are marked similarities between open-price associations and exchanges. Both are organized groups of traders providing a common meeting ground and a continuously functioning mechanism for recording the market operations of their members. But while open-price associations are made up solely of *sellers* in the particular market with respect to which they are organized, exchanges are composed of both *buyers* and *sellers*, or, more accurately, of traders who buy as well as sell in the same market. Accordingly, the operations recorded in the former case comprehend, not transactions between the members as buyers and sellers, but either the self-contained activities (from the proprietary standpoint) of the several members, or their transactions with non-members; on the other hand, the operations recorded in the case of the exchange comprise solely dealings among the members of the group, who ordinarily are genuine competitors both on the buying and on the selling side. Both types of organization

tend to evolve rules governing the methods of dealing pursued by their members. In the case of open-price associations these rules find expression in the uniform contract forms that are sometimes adopted and in some of the stipulations of the codes of business ethics that are occasionally formulated, as a means of establishing general technical regulations touching commercial transactions in the particular trade or industry. Upon the exchanges the rules adopted are designed to regulate the routine involved in concluding market transactions, as a means of expediting negotiations and facilitating settlements.

From the standpoint of public policy, the activities both of open-price associations and of exchanges are primarily significant because of the influence of their recorded transactions upon price policy and volume of business. The market facts made available through open-price associations, even when unaccompanied by comment and advice, tend to create a basis for concerted action in the adjustment of production and the determination of price. In the long run all the members of the association, being exclusively sellers with reference to the particular market, are guided by common interests. But since the membership of a genuine exchange, on the other hand, represents both buyers and sellers, subject to conflicting interests in the course of prices, no concert of action is developed touching the level of bids and offers or the volume of dealings. While the recorded operations exert a vital influence upon the course of prices, it is an influence untainted, in the absence of conscious manipulation through "pools" or "corners," by agreement or understanding among the associates in the exchange.

An exchange, therefore, properly organized and operated, merely provides a mechanism for orderly competition and bargaining. It is a formal organization of the market, regulated by its members in matters of business detail. Its rules, as generally formulated and enforced, are designed to strengthen the mechanism and improve its facilities, without depriving the public of competitively determined prices. While competitive conditions are measurably regulated by the exchange, there is no inherent tendency toward their suppression.

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Exchanges have become the normal type of trade organization in the marketing of the major staple products of husbandry—grain, cotton, sugar, coffee, rubber, livestock, and the like—because such products are susceptible of fairly accurate grading, and because their sources of supply, as well as of the demand, are broad and multifarious. These characteristics make for active markets, which, in practice, can be most effectively organized through the mechanism of exchanges. For similar reasons security exchanges have been widely developed. The commercial basis of these exchanges, therefore, creates a clear presumption that they are legitimate organizations, and in view of the scope of their membership and the character of their operation, as previously indicated, they are universally regarded as presumptively lawful bodies from the standpoint of public policy. As generally constituted and as normally conducted, they tend to facilitate competition rather than to restrict it. When open upon reasonable terms to any person desiring to deal in the given commodity, when all orders to buy or sell are executed as issued, the market permitting, when no fictitious transactions are sanctioned or allowed, and when "owners" are discountenanced, exchanges appear to be indubitably legal. But the particular rules adopted by an exchange often raise problems of considerable difficulty.

§2. The Validity of Restrictive Admission Rules

Do the activities of an exchange become illegal by virtue of rules which restrict the membership either absolutely, by fixing a specified number, or arbitrarily, by making admission dependent upon acceptance of an applicant by a committee or by the entire body? In practice, most exchanges are not open to all dealers. Membership in them is a matter not of right, but of privilege, a membership committee commonly being vested with wide discretion in the admission or rejection of any applicant. The extent of membership is not infrequently limited, and the cost of obtaining it, through the purchase of a "seat" or otherwise, is often high. Are such rules sustainable? The answer to this question would seem to depend upon the actual or probable effect of such

rules, in the light of the circumstances of each case, upon the maintenance of essentially competitive conditions. It should be noted that in the typical case an exchange provides for transactions by its members in the capacity of agents, as well as for trading by each on his own account. Under these circumstances, the restrictive admission rules do not prevent or hinder the purchase or sale of the commodity the marketing of which the exchange is designed to facilitate. They only operate, rather, to restrict the choice of brokers, and that, too, not in the entire market, but merely in that portion of it represented by the exchange. While the admission rules may thus obstruct the free flow of brokerage services, they can only to a negligible degree interfere with the free course of trade in the goods market. What amounts to a restraint of trade in a goods market is in no wise controlled by the determination of what amounts to a restraint of trade in the market for personal services.[1] Incidentally it may be noted, also, that the brokerage business, which is alleged to be artificially regulated by such admission rules, is not, in and of itself, comprehended within the sphere of interstate commerce to which the jurisdiction of the Federal Government is confined.[2] Accordingly, the illegality of restrictive rules of admission is not clear and manifest, even though they limit the membership to a fixed number. They do not vitally restrict the market in which, for example, the owner of wheat may sell his product. He is not only free to sell it off the exchange to any party ready to buy, but also on the exchange, to the limited number of members, and through them, to anyone in the world who may seek his offering there. On the whole, therefore, in spite of the usual admission requirements, it seems clear that trade is promoted rather than restrained, and the public interest is subserved rather than jeopardized, by the organization and operation of exchanges.

The few adjudicated cases that are available tend to confirm this view. There was an express determination, almost two decades ago, that an exchange, being a voluntary organization to provide facilities for promoting the trade of its members, is not bound to admit any applicant to mem-

[1] *State v. Duluth Board of Trade*, 107 Minn. 506 (1909).

[2] *Hopkins v. U. S.*, 171 U. S. 578 (1898).

bership;[1] and there are other early cases holding that exchanges which have rules establishing rigid control over admission to membership are not illegal associations, although these specific regulations were not *per se* brought in question.[2] The recent case of the New England Fish Exchange,[3] in which the attack of the Government was successful, is particularly instructive. It indicates the possibilities of abuse that are present in the organization of an exchange, the way in which its normal functions may be subverted, and the fixed intent of the courts to distinguish between the legitimate and illegitimate operation of exchanges.

One of the principal charges upon which the prosecution of the New England Fish Exchange appears to have been predicated was that membership in the exchange was severely limited. But the bearing of this issue upon the legal status of the exchange was complicated by other significant circumstances. The exchange was organized in 1908 among the wholesale fish dealers in Boston, forty-four in number. An agreement was made with the captains of fishing vessels whereby, in return for the use of the wharfage facilities for weighing and handling the fish, as well as for the privileges of the trading floor, furnished by the exchange, the captains were charged a small toll upon every one thousand pounds of fish sold. From the dealers was collected an "assessment" for fish bought, varying according to kind and grade. This yielded the exchange a liberal revenue. Shortly after the organization of the exchange, the member dealers, all wholesalers, adopted a rule which prevented any enlargement of their membership; but a few large retail dealers were from time to time granted monthly permit cards by a committee of the exchange, which reserved the right to revoke them at will. The largest number of these cards outstanding at any one time appears to have been about twelve. These cards gave to their holders access to the trading floor, but they did not exempt the non-member dealers from the tax on purchases. In like manner, so-called

[1] *People v. Chicago Board of Trade*, 224 Ill. 370 (1906).

[2] *N. Y. & Chicago Grain & Stock Exchange v. Board of Trade*, 127 Ill. 153 (1889); *Anderson v. U. S.*, 171 U. S. 604 (1898); *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236 (1905).

[3] *U. S. v. New England Fish Exchange*, 258 Fed. 732 (1919).

"sellers' tickets" were issued to non-member commission merchants who shipped in fresh fish from other North Atlantic ports, where the fish had been originally landed, for sale upon the Boston exchange. There were eighteen of these authorized commission merchants at the time of the filing of the indictment, and each of them was compelled to agree to sell to members of the exchange only, or to dealers holding buyers' permits. Furthermore, in 1916, two distinct and, at the outset, antagonistic movements were set in train for the consolidation of the interests of the exchange-member dealers. One resulted in the formation of the Boston Fish Pier Company, which came to include twenty-eight of the wholesale dealers and one commission merchant. The other led to the organization of the Bay State Fishing Company under the direction of an outside promoter, who was unable to secure the allegiance of more than eight dealers. This concern gained considerable power in the fish market, however, through the acquisition of a complete monopoly of the steam trawlers bringing fish to the Boston market. During a certain period of the year the trawling fleet represented the sole dependable source of supply of fresh fish, and normally furnished about thirty per cent of the total supply.[1] These two consolidated companies not only controlled the bidding of their constituent firms, which remained nominally separate operating units, but the Boston Fish Pier Company came into position, through the acquisition of a majority interest in the exchange, to fix the tax on purchases to its own enrichment.

The court viewed this situation as obnoxious to the law in a number of respects, and issued a decree of relief accordingly. The exchange regulations appeared to narrow the market artificially and the business of dealing in fish in that market was concentrated in the hands of a small compact group. The free course of trade, therefore, was obstructed, and the arbitrary exaction of unreasonable charges was facilitated. Hence, for one thing, the court required the dissolution of the

[1] This particular outcropping of the underlying conspiracy was attacked in the state courts as a common law offense and a violation of the Massachusetts statutes. The defendants were found guilty upon several counts, and the Supreme Court upon appeal refused to set aside the verdict. *Commonwealth v. Dyer*, 243 Mass. 472 (1923).

Boston Fish Pier Company and the Bay State Fishing Company. But, what is more significant for our present inquiry, it also ordered the exchange to open its facilities, on uniform and equitable terms, to all dealers who might desire to trade in that market.[1] On its face, this form of relief might be construed as a sweeping condemnation of restrictive rules of admission in the operation of exchanges. It is possible, however, that the decree was much more drastic in this respect than would normally be imposed on an exchange the members of which acted as buyers or sellers, not merely in their own interests, but also as brokers, for the account of outsiders. This is the customary situation in produce exchanges as well as in security exchanges, and providing the fees fixed for such services are reasonable, there might seem to be no reason for compelling the exchange to grant the use of its facilities to every applicant who seeks admission, regardless of his financial responsibility, his business competence, his familiarity with the usages of the trade, or the likelihood of his adherence to the regulations of the exchange floor. Since the decision in the Fish Exchange case was largely based upon special circumstances and conditions, it is not likely that the absence of free and unrestricted membership in an exchange would normally be held to cast doubt upon the legality of the organization.

§3. The Validity of Non-Intercourse Provisions

Just the reverse of the situation presented by restrictive admission regulations is that created by provisions forbidding members of an exchange to deal with non-members or "off" the exchange. It has already been pointed out that concerted action looking to the exclusion of outsiders from any market is unlawful—that, as a general rule, membership in a given trade organization can not be made a condition precedent to engaging in any particular line of business. This principle has been widely applied to the activities of trade associations. It has been held to constitute a clear contravention of this principle for an association to enter upon any agreement or understanding calculated, directly or indirectly,

[1] A motion to modify the decree in certain respects was subsequently denied, 292 Fed. 511 (1923).

to exclude non-member firms from the trade or industry involved.[1] May exchanges adopt rules inconsistent with this doctrine without becoming subject thereby to the penalties commonly visited upon trade associations in the narrower sense for like action?

In one of the first cases in which the Supreme Court had occasion to apply the Sherman Anti-Trust Act to exchanges, the validity of such a regulation constituted the principal point at issue.[2] The defendants in the Anderson case were members of the Traders' Live Stock Exchange. They were known as "yard traders," who bought and sold cattle on their own account in the public market of the Kansas City stockyards. In the usual course of trade, purchases were made from commission merchants representing drovers or stockmen, and sales were made to packers or "feeders." Under the rules of the exchange its members were forbidden to deal with yard traders who were not members, or with commission merchants who dealt with such non-member traders. Membership in the exchange was open to all reputable yard traders who were willing to be bound by its rules. According to the court the issue was "whether, without a violation of the act of Congress, persons who are engaged in the common business as yard traders of buying cattle at the Kansas City stockyards, which come from different states, may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, nor will they buy cattle from those who also sell to yard traders who are not members of the association."[3] The Supreme Court found nothing unlawful in the formation of the exchange or in the regulations under attack. "It will be remembered," the opinion pro-

[1] *Cf. Montague v. Lowry*, 193 U. S. 38 (1904); *Hale v. Hatch & North Coal Co.*, 204 Fed. 433 (1913); *Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S. 600 (1914); *U. S. v. King et al.*, 229 Fed. 275 (1915); *U. S. v. Associated Bill Posters*, 235 Fed. 540 (1916); *Knauer et al. v. U. S.*, 237 Fed. 8 (1916); *Thomsen v. Cayser*, 243 U. S. 66 (1917); *National Harness Manufacturers' Association v. Federal Trade Commission*, 268 Fed. 705 (1920); *U. S. v. Belfi et al.*, 259 Fed. 822 (1920); *Western Sugar Refinery Co. v. Federal Trade Commission*, 275 Fed. 725 (1921); *Wholesale Grocers' Association of El Paso v. Federal Trade Commission*, 277 Fed. 657 (1922); *Southern Hardware Jobbers' Association v. Federal Trade Commission*, 290 Fed. 773 (1923)

[2] *Anderson v. U. S.*, 171 U. S. 604 (1898).

[3] *Ibid.*, pp. 613–614.

ceeds, "that the association does no business itself. Those who are members thereof compete among themselves and with others who are not members, for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader can become a member of the association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of the trade is neither the necessary nor the direct effect of its formation. . . . There is no feature of monopoly in the whole transaction."[1]

These statements of the court are unexceptionable, as far as they go, but it is a question whether they sufficiently recognize the artificial narrowing of the market inherently involved in the regulations under attack. The circumstances urged in mitigation of the restrictive rules would be substantially as applicable to the Eastern States Retail Lumber Dealers' Association, which some fifteen years later was found to have violated the Sherman Act by its efforts to boycott obnoxious wholesale lumber dealers, as they were to the Traders' Live Stock Exchange, whose regulations involved a boycott of obnoxious yard traders. In the lumber case the boycott was induced by a desire to maintain the established channels of trade; the excluded wholesalers were deemed objectionable because of their activities in selling direct to the consumer. In the livestock case the boycott was induced by a desire to strengthen the exchange; the excluded yard traders were deemed objectionable because of their failure to join the association. It was certainly the object of the Traders' Live Stock Exchange in promulgating these restrictive regulations to force all yard traders at the Kansas City stockyards into the association. This was recognized by the court. Similar activities of trade associations to keep out of the market dealers either refusing, or considered ineligible to, membership have been condemned repeatedly. It is no defense to an association of traders adopting such a policy that membership in the organization is open to anyone wishing to carry on the business, and who

[1] *Ibid.*, p. 614.

can meet the standards it sets up. The opportunity of non-members to deal with other non-members who are likewise cut off from dealings with the association constitutes no extenuation in law for such non-intercourse regulations. The essence of the wrongful conduct is deemed to lie in concerted action looking to the arbitrary exclusion of outsiders from trading freely in a given market. In the Anderson case the members of the exchange mutually bound themselves to boycott not only all yard traders who were not members, but also all commission merchants who made sales, however small, to non-member yard traders. This secondary boycott of the commission merchants, independent third parties who were not even eligible to membership in the exchange, would seem, particularly, to constitute an obstruction of the free course of trade, comparable to that condemned in the Lumber Dealers' case.[1]

Upon the basis of the foregoing analysis, and having in mind the recent decisions upon the relation of stockyards and exchanges to the movement in interstate commerce of the property or goods traded in upon them,[2] there is some question as to whether the Anderson case reflects the present state of the law. Indeed, in 1918, two decades subsequent to the decision in the Anderson case, the Supreme Court, in dismissing the government's petition against the Chicago Board of Trade, specifically called attention to the fact that "*members may also trade privately with one another at any place*, either during the session or after, *and they may trade with non-members at any time*, except on the premises occupied by the Board."[3] There is at least an implication here that the denial of this right to trade "off" the exchange and with non-members might be construed as an unlawful restriction. If, on the other hand, the courts should affirm the ruling in the Anderson case, they would probably do so on other grounds than those originally urged. Instead of stress-

[1] *Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S. 600 (1914).

[2] *Stafford v. Wallace*, 258 U. S. 495 (1922); *Board of Trade v. Olsen*, 262 U. S. 1 (1923). For a brief review of these and other recent cases, see 37 *Harvard Law Review*, 136–140.

[3] *Chicago Board of Trade v. U. S.*, 246 U. S. 231, 236 (1918). (No italics in the original.) In *Grisim v. St. Paul Live Stock Exchange*, 188 N. W. 729 (Minn., 1922), a statute prohibiting any exchange or board of trade from enforcing a non-intercourse rule was upheld. See also *State v. Live Stock Exchange*, 211 Mo. 181 (1907).

ing the opportunity of outsiders to obtain membership in the exchange, the emphasis may well be shifted to the peculiar character of the exchange as an organization providing special facilities for trading. In this aspect an exchange differs essentially from a trade association; and it might conceivably be held that it is a reasonable and lawful part of the consideration moving the several traders who contribute to the establishment and maintenance of these facilities that the members should be mutually obligated to confine their trading in the particular goods to the exchange and its members. Only such a regulation might afford reasonable assurance to these associated traders of substantially complete acquaintance with all the transactions occurring in the given market. The courts might not only view this assurance as a valid consideration for the private contract of membership, but even from the standpoint of public policy, they may conclude that the advantage to the competitive process and the benefit to the trade of a closely organized market justify the voluntary assumption of these restrictions upon where and with whom exchange members shall trade. At present, however, the legal status of exchange regulations of this character is uncertain.[1]

§4. The Validity of Internal Trading Regulations

Less subject to suspicion, but not of a radically different nature, are the various regulations adopted by traders associated in an exchange which concern the hours during which trading shall take place, the terms and signs to be employed in negotiation, the methods of settlement, and the like. Such regulations constitute a necessary part of the apparatus of all

[1] What is said here, as elsewhere, refers primarily to the situation within the federal jurisdiction. It is worth noting, however, that three years after the Appellate Division of the Supreme Court of New York had upheld the New York Stock Exchange in its asserted right to enforce a regulation forbidding its members to deal with stock brokers affiliated with a rival exchange, the Legislature passed a statute absolutely repudiating this doctrine. See *Heim v. N. Y. Stock Exchange*, 118 N. Y. Supp. 591 (1909), and same, 138 App. Div. 96 (1910); and Laws of New York, 136th Sess., 1913, vol. II, ch. 477. An examination of the Constitution and By-laws of the New York Stock Exchange discloses no rule at present in force which would prevent a member dealing privately "off" the exchange floor with any one, member or non-member, in any securities, listed or unlisted, at any time, during, before, or after business hours. See Constitution of New York Stock Exchange, Art. XX, secs. 3 and 4, and Resolutions of March 24, 1920, and of May 12, 1920. These documents are reproduced in S. P. Goldman, "Stock Exchange Law," New York, 1923.

exchanges. All of them, in some sense and to some extent, impose limitations upon competition. But, as was pointed out by Justice Brandeis in delivering the unanimous opinion of the Supreme Court in the leading case contesting the lawfulness of such regulations, "the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition."[1] Under the rule of reason it is necessary to determine whether these regulations are merely calculated to facilitate the operation of competitive forces, or whether their interference with freedom of action is designed to obstruct the normal course of trade. In the words of Justice Brandeis, already quoted in another connection: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Restraint of competition and restraint of trade are not identical. Restrictions upon competition are deemed to restrain trade only when, upon an examination of their manifest or necessary purpose and of their actual or probable effect, they are found to operate to the prejudice of the public by undue or unreasonable interference with the free functioning of competitive interests.

On such a basis the court examined, among other things, the nature of the "Call Rule" of the Chicago Board of Trade.[2] According to this rule members agreed to make bids upon "to arrive" consignments between the closing of the call market in the afternoon and the opening of the regular market upon the next business day only at the closing quotation in the call market. The validity of this regulation preventing changes in price between sessions was specifically upheld. The court found that "within the limits of its operation the rule helped to improve market conditions" in a number of directions. "It created a public market for grain 'to arrive.' Before its adoption bids were made privately. Men had to buy and sell without adequate knowledge of market conditions. . . . It distributed the business in grain 'to arrive' among a far larger number of Chicago receivers and commission merchants than had been

[1] *Chicago Board of Trade v. U. S.*, 246 U. S. 231, 238 (1918).
[2] *Ibid.*, pp. 239–241.

the case there before. . . . It eliminated risks necessarily incident to a private market, and thus enabled country dealers [as well as 'grain merchants of Chicago'] to do business on a smaller margin."[1] Other internal exchange regulations are tested in similar fashion.[2]

§5. The Abuse of the Facilities of Exchanges

Having discussed the effect of rules of admission, of rules controlling the relations of members with non-members, and of rules governing the internal administration of the market upon the legal status of exchanges, the principal features of the organization and operation of a typical exchange have been surveyed. But not all exchanges are typical or normal. It is quite possible to effect an association in the outward form of an exchange which is in essence a mere price-fixing mechanism. Some of the possibilities of abuse were set forth in the New England Fish Exchange case previously analyzed and discussed. A situation involving more direct and more flagrant price manipulation was revealed in two prosecutions of associations in the butter and allied products trade in the Middle West.[3] The facts in the two proceedings were so substantially similar that it will suffice to describe the later case.

The members of the Elgin Board of Trade were large-scale manufacturers of butter, known in the trade as "centralizers," with plants located in an area roughly bounded by the Ohio and Missouri rivers and the Canadian line. The exchange established a "call board" the regular sessions of

[1] *Ibid.*, pp. 240–241. It is interesting to note, in view of our previous discussion of the Anderson case, that in the concluding paragraph of this opinion the court took occasion to remark that "the restraint imposed by the rule is less severe than that sustained in *Anderson v. United States.*" (p. 241.) This may possibly be interpreted not only as offering collateral support for the Board of Trade decision, but also as casting a shadow of doubt upon the earlier decision.

[2] Cf. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670 (1879); *Goddard v. Merchants' Exchange*, 9 Mo. App. 290 (1880); *Albers v. Merchants' Exchange*, 138 Mo. 140 (1897); *Green v. Board of Trade*, 174 Ill. 585 (1899); *Evans v. Minneapolis Chamber of Commerce*, 86 Minn. 448 (1902).

[3] *U. S. v. Chicago Butter & Egg Board.* Petition was filed June 13, 1910, in the Circuit Court, N. D. Ill., and a decree granting the relief sought was entered Oct. 12, 1914; *U. S. v. Elgin Board of Trade et al.* Petition was filed Dec. 14, 1912, in the District Court, N. D. Ill., and an uncontested decree was entered April 27, 1914. See List of Cases Instituted by the United States under the Federal Anti-Trust Laws, Department of Justice, Washington, December, 15 1923, pp. 83, 96.

which were held on Monday of each week. Only members were permitted to trade at these sessions, but apparently transactions were not confined to purchases and sales on their own account. All transactions were required to be recorded by the secretary of the Board, and immediately at the close of each session these recorded data were laid before a "quotation committee" composed of five elected members. As described in the rules of the Board, it was the duty of this committee, "after examining the record of regular sales and taking into account the quantity of butter sold, as well as offered and remaining unsold, and also the state of other markets of the country . . . to establish the market price of butter for that day . . . which price shall be known as the board price. This price shall govern all contracts."[1] In other words, the prices paid by the centralizers to farmers for their cream, and to local butter and cheese establishments for their output, as well as the prices for sales by themselves to distributors, were thus determined for the remainder of each week by the fiat of the quotation committee. In all such transactions the members of the association were mutually bound to follow the "board price." Since there were well-marked seasons (the summer months) during which the interests of the centralizers lay mainly in purchases, and other seasons during which their interests were primarily in sales, the advantages of this arrangement are obvious. But perhaps the most revealing section of the Board rules is the following: "The establishment of such 'board prices' shall not invalidate any sales made *between members* either on the call or otherwise at a price fixed at the time the sale was consummated."[2] This provision scarcely requires comment. There was a manifest conspiracy to manipulate prices for the benefit of the members of the Board, at the expense of outside participants in the trade, and, ultimately, of the consuming public. The machinery of the Board was utilized as a means of subverting the normal functioning of the competitive process.

Looking now to the sphere of action of the exchange itself, as distinct from its operation as an agency for regulating the

[1] Petition in Equity No. 31051, in District Court, N. D. Ill., p. 20.

[2] *Ibid.*, p. 21. No italics in original.

conduct of its members, there are certain obvious limitations upon the scope of its undertakings inherent in the nature of the organization. Usually the only business transactions of the exchange itself relate to the distribution of price quotations based upon its recorded sales and to the leasing or maintaining of physical facilities. Its property right in these quotations has been upheld in a number of decisions.[1] As a rule the information is secured by outside parties through subscription to a ticker service. There appears to be ample authority for the doctrine that arbitrary discrimination among applicants for the service is unlawful.[2] Whether an exchange may go so far as to refuse all publicity concerning the market operations upon its premises appears not to have been decided. And in view of the manifest advantage to exchange members of enlisting the interest and confidence of the public in their market it is not likely that the issue will arise. On principle such a practice would be of doubtful legality, since it would tend to restrict competition to the exchange floor.

Finally, how far does the illegitimate conduct of individuals operating on an exchange reflect upon the lawfulness of the exchange itself? It would seem that in so far as this conduct is not the normal and regular behavior of members, and does not spring from special rules and regulations facilitating the prosecution of unlawful operations, it should not affect the legal status of the organization. For example, traders on an exchange may be guilty of restraining trade under the Sherman Act by organizing a "corner."[3] The conspiracy involved in such an operation, which is based upon the purchase of goods for future delivery in a larger amount than can actually be delivered at the contract date, is held illegal on the theory

[1] *Chicago Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236 (1905); *McDearmott v. Board of Trade*, 146 Fed. 961 (1906); *Board of Trade v. Tucker*, 221 Fed. 305 (1915).

[2] In *N. Y. & Chicago Grain & Stock Exchange v. Board of Trade*, 127 Ill. 153 (1889), it was held that a subscriber to the ticker service could not be deprived of his connection if willing to pay the regular fee and to abide by reasonable requirements with regard to the use of the information furnished. See also *Western Union Telegraph Co. v. State ex rel.*, 165 Ind. 492 (1905); *Friedman v. Gold Telegraph Co.*, 32 Hun 4 (1884). Compare, however, *Moore v. N. Y. Cotton Exchange*, 291 Fed. 681, 683 (1923), in which the court said: "*The right of the defendants to withhold its quotations for other reasons is necessarily conceded*, but it has no right to make its refusal a step in a scheme to monopolize the business of dealing in cotton." No italics in original.

[3] *U. S. v. Patten*, 226 U. S. 525 (1913).

that the syndicate "running the corner" has abused competitive privileges and has thereby upset the normal course of trade.[1] But there is nothing in such a situation to impeach the legality of the exchange as a market mechanism. Such operations may be carried out quite as well, perhaps more effectively, in the absence of this type of market. Generally, therefore, unlawful combinations organized and operated on an exchange do not necessarily reflect upon the legitimacy of the exchange itself. Should it appear, however, that the established mode of functioning on an exchange naturally lends itself to the unlawful operations of individual members designed to restrain trade, and is used to cloak their secret machinations against the public interest, the whole organization might be disbanded in appropriate proceedings.[2] But such a situation would clearly be abnormal. The possibility of its emergence does not necessitate any amendment of the general legal principles applicable to the organization and operation of exchanges as set forth in the preceding pages.

[1] On the question of the legality of dealings in "futures" as such—that is, without regard to the use of future contracts in manipulating corners—see the following: *Clews v. Jamieson*, 182 U. S. 461 (1901), held valid at common law; *Embrey v. Jemison*, 131 U. S. 336 (1889), held invalid, upon proof that there was no bona fide intention to perform the contract according to its terms. Under statutes and constitutional provisions making such transactions criminal offenses, penalties have been held enforceable in: *Booth v. Illinois*, 184 U. S. 425 (1902), *Otis v. Parker*, 187 U. S. 606 (1903), and *Logan & Bryan v. Postal Telegraph & Cable Co.*, 157 Fed. 570 (1908), where a statute defined the offense without regard to the question of intent. The recent federal statute regulating future trading in grains, Grain Futures Act, 1921, 42 Stat. at L. 998, was upheld in *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923).

[2] As a result of the rapid rise in the price of raw and refined sugars during the spring of 1923, an attack, founded upon such a charge, was launched against the New York Coffee and Sugar Exchange. The bill was held bad on demurrer, and the judgment of the lower court was sustained by the Supreme Court on appeal. *U. S. v. N. Y. Coffee & Sugar Exchange*, Sup. Ct. of U. S., No. 331, Oct. Term, 1923, (Jan. 28, 1924). Chief Justice Taft said (p. 4): "The machinery of such an exchange has at times been made the means of promoting corners in the commodity dealt in by such manipulators and speculators, thereby restraining and obstructing foreign and interstate trade. In such instances the manipulators subject themselves to prosecution and indictment under the Anti-Trust Act. *U. S. v. Patten*, 226 U. S. 525. But this is not to hold that such an exchange with the facilities it affords for making contracts for future deliveries is itself a combination and conspiracy thus to restrain interstate and foreign trade." It is submitted, however, that the rules enforced by an exchange might so definitely encourage restraints of trade and illegitimate speculative activity as to render the organization unlawful. One of the dangerous possibilities lies in the fact that exchanges commonly enforce contracts made in market sessions by the penalty of expulsion. Should an exchange thus re-enforce the power of a syndicate "running a corner," the association might well become as guilty as the manipulators of the pool. As a rule, however, exchanges take active measures to prevent "corners," and endeavor to preserve a "free market" or "open market" for the commodities sold.

CHAPTER VIII

COLLECTION AND DISSEMINATION OF TRADE STATISTICS

§1. The Importance of the Statistical Function

No problem relating to the practical functioning of trade associations is of greater immediate interest or of more far-reaching significance than that of the legitimate scope of their statistical service. It is not too much to say that the permanence of the association movement, and in some measure the character of future industrial organization, are bound up with the adequate solution of this problem. The ultimate and essential basis for the existence of trade associations is to be found in the opportunity they afford their members, who severally exercise independent control of industrial enterprises, to approach their undertakings and responsibilities, not as isolated tasks and obligations, but in their relationship to the whole network of activities by which society is provided with the particular product or service. To expect this end to be achieved without permitting a free and abundant interchange of information concerning business activity and economic conditions in all parts of the given trade or industry is to expect the impossible. It is futile to assume that the men who direct the production and distribution of goods in the modern industrial system can reach sound judgments and pursue wise policies on the basis of intuition, even when reinforced by such market facts as are generally available to them as individual enterprisers. Under such conditions, particularly when producers and dealers are scattered over wide territory and numerous small concerns contribute to the aggregate service of the business, it is often difficult to avert industrial chaos. Only knowledge, based upon ascertained facts, provides a sure foundation for the adequate regulation

of business affairs in the complex economic organism which today serves the material needs of the community. Such knowledge is essential to the effective operation of competitive forces.

Accordingly, the collection and dissemination of trade information, in some measure and through some channel, appears to be indispensable to the smooth ordering of manufacturing and marketing activity. In recent years the performance of this function has been widely undertaken by trade associations, first, because of a growing recognition of the vital need of broad market data, and second, because these organizations, aside from government bureaus, afford the most natural and promising medium for compiling and distributing the results of the collective experience of particular trades or industries. It has already been noted that the legality of this association activity has been called into question. It is the present purpose to examine, in some detail, the scope and limitations of the legal doctrine which is alleged to have cast serious doubt upon the legitimacy of the statistical service of trade associations.

§2. The Condemnation of Open-Price Arrangements

Just how are competitive enterprises permitted to organize a system of reporting trade information covering their particular branch of industry? According to the decisions of the Supreme Court, what is commonly known as the "open-price plan" has been held within the prohibitions of the Sherman Act. In the Hardwood and Linseed Oil cases reporting systems providing for intimate and detailed disclosures, upon a confidential basis, by competing producers concerning their respective individual operations were condemned.[1] But subsequently, in the Maple Flooring and Cement cases, the Supreme Court has upheld trade association statistical services of an elaborate character.[2] It becomes necessary, therefore, to analyze carefully the grounds

[1] *American Column & Lumber Co. v. U. S.*, 257 U. S. 377 (1921); *U. S. v. American Linseed Oil Co.*, 262 U. S. 371 (1923).

[2] *Maple Flooring Manufacturers' Assn. v. U. S.* Docket No. 342, June 1, 1925; *Cement Manufacturers' Protective Assn. v. U. S.*, Docket No. 551, June 1, 1925.

and limits of the earlier decisions, and to determine just what has been the effect of the two more recent decisions in respect to the legitimate scope of co-operative trade reporting.

There appear to have been three principal characteristics of open-price activity, as disclosed in the Hardwood and Linseed Oil cases, upon which the attack was centered and which rendered the association work vulnerable. In the first place, the participants in the plans prosecuted were sellers only. They alone gave information and they alone received information. Speaking abstractly, these participants were also buyers; they bought raw materials or semi-finished products. But in the market with reference to which their "open competition" plans were formulated, they were solely sellers. The arrangement was avowedly a combination of sellers. These sellers acquired an intimate knowledge of each other's affairs, but proclaiming themselves competitors, they went forth, in the words of the court in the Linseed case, "to deal with widely separated and unorganized customers necessarily ignorant of the true conditions."[1] And the market data collected and distributed were not sent to buyers. In the Linseed case the data were not published by the Bureau, so as to become available to buyers, even indirectly; they were sent to the subscribers in confidential communications.[2]

Secondly, these open-price associations were deemed obnoxious because of the character of the data assembled and distributed. The information was confined, for the most part, to matters bearing directly on price-fixing. The selection of facts to be reported was manifestly so made as to facilitate harmonious price policy among the members of the group. Moreover, the market data interchanged were much

[1] 262 U. S., 390.

[2] It is interesting to note that in the Hardwood case, while the association was composed exclusively of sellers, and no reports were sent directly to buyers, the assembled data were uniformly published. In his dissenting opinion Justice Brandeis emphasized this aspect of the situation as follows: "No information gathered under the Plan was kept secret from any producer, any buyer or the public. Ever since its inception in 1917, a copy of every report made and of every market letter published has been filed with the Department of Justice, and with the Federal Trade Commission. The district meetings were open to the public. Dealers and consumers were invited to participate in the discussions, and to some extent have done so." 257 U. S., 415.

more intimate and detailed than would normally be disclosed by genuine competitors, and the disclosures were obviously much more minute than was necessary for purposes of intelligent and straightforward competition. In the daily sales and shipment reports, for example, the Plan of the Hardwood Association called for the submission of duplicates of every sale made or order taken, and exact copies of all invoices, and when this information was compiled and distributed, each manufacturer was presently apprised of the names of his competitors' customers, together with the price and amount of every kind or grade of lumber purchased by them. Under the arrangement of the Linseed Crushers' Council, such an interchange of specific data concerning offers, bids, sales, and prices constituted the very sum and substance of the so-called statistical service provided by the Bureau. The assumption of the obligation to make reports of this character, not to a public agency, but to a group of men of supposedly adverse interests, was deemed by the majority of the Court inconsistent with that independent struggle for advantage which constitutes the essence of competition.

Finally, these open-price plans were held to be illegitimate because they provided for an interchange of opinion with regard to trade prospects and future policy. In the Hardwood case the comments of the Manager of Statistics, by way of interpretation of the assembled data, were found to have the character of advice and persuasion calculated to produce harmonious action. Moreover, in both cases there were frequent and regular meetings of the associates. The discussion, at these meetings, of the regularly compiled statistical data and of current market conditions corroborated the judicial impression that the entire arrangement was primarily a device for concerted control of prices. These gatherings afforded an opportunity for the exertion of a subtle form of group pressure to induce conformity to lines of trade conduct deemed essential to the promotion of the common interests of the group as a unit. There was present no salutary check, in the way of customer influence or official oversight, to serve as an offset to the "getting together" impulse. Although some producers or dealers might be in-

clined to pursue independent courses of action, there was nothing to counter-balance the frank protests or insidious pressure of the vast majority of "conforming" members. The court found in the record ample evidence of persistent and pervasive efforts, at these meetings, which constituted an integral part of the open-price plan, to bring about harmonious action among the associates.

In the light of these combined circumstances, genuine price competition was held to be severely hampered, if not completely suppressed. This was held to be sufficient to bring the associated activity under the ban of the law. The emphasis of the court was placed upon common understanding and concert of action. In the Linseed case the elaborate mechanism for the interchange of practically every variety of detailed information about individual business operations, coupled with the announcement of current prices and a binding promise from each member to adhere to such prices until notice given to the contrary, were regarded as ample evidence of the purpose to effectuate an unlawful restraint of trade. The essential nature of the Plan of the Hardwood Association was described by the Supreme Court in the following language:

> "The 'Plan' is, essentially, simply an expansion of the gentlemen's agreement of former days, skilfully devised to evade the law. To call it open competition because the meetings were nominally open to the public, or because some voluminous reports were transmitted to the Department of Justice, or because no specific agreement to restrict trade or fix prices is proved, cannot conceal the fact that the fundamental purpose of the 'Plan' was to procure 'harmonious' individual action among a large number of naturally competing dealers with respect to the volume of production and prices, without having any specific agreement with respect to them, and to rely for maintenance of concerted action in both respects, not upon fines and forfeitures as in earlier days, but upon what experience has shown to be the more potent and dependable restraints of business honor and social penalties,—cautiously reinforced by many and elaborate reports, which would promptly expose to his associates any disposition in any member to deviate from the tacit understanding that all were to act together under the subtle direction of a single interpreter of their common purposes, as evidenced in the minute reports

of what they had done and in their expressed purposes as to what they intended to do."[1]

§3. The Essentials of Legitimate Statistical Services

But there was nothing either in the Hardwood case or in the Linseed case stigmatizing trade reporting as such or condemning, on principle, the collection and dissemination of general statistical data by trade associations.[2] Properly organized and properly conducted such association work would seem, moreover, to be fully worthy of the sufferance of the law, at the very least. The genuineness of competitive rivalry does not hinge upon the maintenance of ignorance. On the contrary, knowledge of the market is a necessary prerequisite to the effective operation of the competitive process, and provision of the information upon which such knowledge must be based does not appear to be inconsistent with any accepted legal doctrine. It is not unlawful to circulate information concerning the state of the market, else the publication of market reports in every newspaper in the land might be enjoined. Nor, in view of the decisions protecting stock and produce exchanges in their right to secure revenue from their quotation services,[3] can it affect the legality of the practice that the party providing the information is a trade organization composed of men interested in the course of the prices quoted.

Accordingly, endeavors have been made to remodel the statistical services of trade associations along lines calculated to forestall adverse judicial opinion. At least one attempt

[1] 257 U. S., 411–412.

[2] In the Linseed case the Court said: "We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection. The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties." 262 U. S., 390.

[3] *Chicago Board of Trade v. Christie Grain & Stock Co.*, 198 U. S., 236 (1905).

has led in the direction of including buyers as well as sellers in the association, and thereby establishing a market similar to that provided by the produce exchanges.[1] In such an organization all influences bearing upon the market may find expression, and all relevant information circulated in the trade would tend to center. Under these conditions, however, no independent means are normally employed to investigate underlying conditions and report significant facts. The situation is simply this: that what happens to be discovered by one is more readily made apparent to all, since all current transactions influenced thereby are publicly consummated. Nevertheless, in so far as open-price associations are designed to facilitate and safeguard the process of market price determination, the exchange undoubtedly represents an improved mechanical expedient and one less subject to subversion.

The most significant changes which have been recently introduced by trade associations in their efforts to evolve statistical services that conform with the law, however, have concerned the substance of the reports made by the members, the publication of the results, and the matter of interpretation of the facts thus disclosed.[2] As a rule the producers or dealers no longer transmit the names of their customers and the amount and terms of the sales to each, and the compiled reports, as disseminated by the central office, no longer provide identified data relative to the operations of the several individual associates.[3] Market information made available has shown a tendency to become more general in character, specific details being omitted. Even when this general information comprehends data on production, sales, prices, shipments, and stocks on hand, it but provides a broad factual basis for independent judgment on economic condi-

[1] The Paper Industries Exchange was organized in Chicago on August 15, 1923, but ceased to function December 1, 1923. See *Paper Trade Journal*, vol. 77, Sept. 6, 1923, p. 34, and Oct. 11, 1923, p. 38; also *Commercial and Financial Chronicle*, vol. 117, pp. 1086–1087, 2830–2831.

[2] See letter of Wilson Compton, Secretary and General Manager of National Lumber Manufacturers' Association, to Department of Commerce, dated Feb. 6, 1924.

[3] Consult, for example, the admirable statistical reports by the Rubber Association of America and by the American Iron and Steel Institute.

tions and market trends in the trade or industry rather than a minute disclosure of intimate business affairs calculated to secure harmony of action. The tendency has been clearly toward the development of genuine statistical services, as an aid toward rationalizing production and marketing policies, toward the achievement of stability in its most acceptable economic sense. Moreover, the wide-spread co-operation of trade associations with the Department of Commerce, in furnishing the statistical material relative to their respective industries for publication in the official "Survey of Current Business," is unmistakably in line with the tendency to relieve this important activity from the taint of illegality. By this means the compiled information is rendered available to buyers and the general public, as well as to the associates who make the reports upon which the compilation is based. Finally, the practice of subjecting the statistical data to interpretation by a common agency has been progressively relinquished, and the discussion of prices at the meetings of the associations is being prudently curbed. Official comment, bordering upon recommendation, is not essential to the legitimate use of statistical data; and in order to formulate prudent business policies on the basis of accurate trade information it is not necessary that competitors meet frequently to "talk over" prices. It has come to be widely recognized that the mere technical interpretation of the assembled and tabulated figures, and the discussion, at association meetings, of general economic and trade conditions rather than specific production and price policies, are sufficient, without more, to facilitate the effective utilization of a genuine statistical service.

Would these efforts avail to save the statistical services of trade associations from judicial condemnation? Or was the enlightened administration of business affairs to be compelled to wait upon the further initiative of the government? The issue had not long to await determination. The Department of Justice placed upon the Hardwood and Linseed decisions a most restrictive interpretation. This was evidenced by the terms of consent decrees forced upon reluctant trade associations as well as by the correspondence between

Attorney-General Daugherty and Secretary Hoover.[1] For example, in the consent decree against the Tile Manufacturers' Credit Association,[2] and in the decree sanctioned by the district court in the case of the Cement Manufacturers' Protective Association,[3] both entered in 1923, the defendants were enjoined from making any reports upon production, shipments, stocks, or prices, save for transmission to a department of the government upon its request and not for distribution among themselves.

Such broad prohibitions seemed to extend the legal interference with co-operative activities in trade associations to clearly unwarranted limits.[4] The attitude of the Department of Justice reflected in these decrees would have compelled the management of trade and industry to rear the business structure on the sands of guess work; and yet there was no valid consideration of public policy to justify such an attitude. The extreme scope and intricate ramifications of modern markets can only be coped with successfully when those who operate upon them are permitted to avail themselves of all the information which modern agencies of communication can assemble. Isolated producers and small concerns are in especial need of the service which is rendered by the compilation and distribution of trade facts. And it is not to be overlooked that, in the long run, the risks of doing business by blind chance are paid for by the community.

It is true that these decrees did sanction the collection of the essential data upon request to do so by a government department. But in the absence of the deliberate establishment of a comprehensive government statistical service, and

[1] As resumed in December, 1923. See particularly the Attorney-General's letter of December 19, 1923, replying to Secretary Hoover's inquiry of December 11, 1923.

[2] *U. S. v. Tile Manufacturers' Credit Association*, U. S. District Court, S. D. Ohio, In Equity, No. 201, Nov. 26, 1923.

[3] *U. S. v. Cement Manufacturers' Protective Association et al.*, U. S. District Court, S. D. New York, In Equity, No. E, 22–25, Dec. 13, 1923, reported in 294 Fed. 390 (1923).

[4] But it must be remembered that injunctions such as the one in the Tile case are entered, not after hearing and decision by the courts, but merely upon admission of illegality by the dependants and their consent to be enjoined in preference to standing trial.

the provision of adequate appropriations for its support, the saving clauses of these decrees enjoining the interchange of trade information among the association membership provided, at best, only for sporadic statistical activity. It would have been futile to expect that the necessary organization and facilities would be maintained by trade associations under such circumstances. Moreover, it seemed inconsistent with accepted economic doctrine and public policy that the advancement of industrial welfare through legitimate means should be forced to wait upon the initiative of government.

While there are many who believe it to be a proper and highly desirable function of government to compile and distribute statistics of commerce and industry, it would appear to constitute an arbitrary and unjustifiable departure from established tradition to suppress, or even to curtail, private initiative, pending the action of government, in providing such information. It may be that the government alone can compile data of this character which are at once authoritative and comprehensive.[1] On the other hand, it might be impossible for the government to collect the needed information in the infinite variety required and with the promptness without which trade statistics are valueless for commercial purposes, or to provide service with the flexibility necessary to meet the varied and changing requirements of different industries. The beginnings made by the Department of Commerce in this direction under Secretary Hoover have been promising but not conclusive.

But without challenging the view that the ultimate solution of the problem might be found in the establishment of a thoroughgoing and complete government service it was felt that, so long as the government did not act or pending the adequate development of its service, trade associations provided the sole medium that even approached the government with respect to the organization and facilities essential for carrying on such work effectively. Serious obstacles seemed likely to attend any attempt to develop this service by pri-

[1] Full statistical data upon every branch of the foreign trade of the country have long been officially collected and published for general use. It would constitute a distinct service to American business if like statistics for domestic trade could be rendered equally available.

vate organizations like mercantile agencies or general research bureaus, for instance. The willingness of individual concerns to disclose business facts is properly conditioned upon the assurance that like facts are to be obtained from competitors, and that the information thus secured will not be used to their prejudice. Without a long period of educational pioneering, no mercantile agency or private statistical service could give these assurances to business. On the other hand, trade associations by the very character of their organization seemed to constitute the most natural and effective instrument for the collection and dissemination of business statistics in their respective fields. For these reasons, it was confidently predicted that there would eventually be a decided reaction from the restrictive point of view adopted by the Department of Justice and a closer approach to the more statesman-like attitude of the Department of Commerce. The curious situation of intense suspicion of the statistical activities of trade associations in one government department and of deep conviction of their usefulness in another department of government was bound to resolve itself eventually.

§4. The Effect of Recent Decisions

In this perplexing and unsettled situation the recent decisions of the Supreme Court upon the appeals in the Maple Flooring and Cement Association cases have come as a welcome relief. The opinions of the Court in these cases may not constitute a complete solution of the problem of defining the legitimate scope of the statistical activities of trade associations, but they at least provide a solvent to the knotty dilemma in which the policy of the federal prosecuting agencies and the necessities of business practice had involved business executives. It is proposed to analyze these cases with the object of showing how far they have clarified the legal situation surrounding trade association statistical activities.

In the district courts, in both the Maple Flooring case and the Cement case, it had been recognized that the defendant

associations had not formed the media of any outright agreement upon business policy among the member concerns. Rather from the evidence of certain illegitimate activities of predecessor organizations, comprising much the same membership in each trade, there was inferred an unlawful purpose in the organization and conduct of the statistical services of defendants. In reviewing these adverse judgments, the Supreme Court summarized the activities primarily at issue under four heads in each case. All have a bearing upon the statistical work of trade associations, but as association cost accounting work and the organization of the interchange of credit information will be subsequently discussed in separate sections, the activities of the defendant associations in these directions will not here be reviewed. The character of three of the activities summarized were similar in the two cases and on these points they may be discussed together. Both associations had compiled and distributed freight-rate books showing transportation costs from one or more commonly used basing points to consuming centers throughout the United States. The mere publication of this information, without any obligation being assumed either to quote delivered prices or, if quoted, to compute freight charges on the basis of a fictitious shipment from basing point to point of actual destination, was held by the court to be a simple means of facilitating the prompt transaction of business. In the view taken of this activity there was no reflection in it of an unlawful purpose looking to the maintenance of uniformity of delivered prices. Likewise in respect to the frequent meetings of the members of these associations, in the absence of any evidence either of agreement at such times upon price policies or even of the discussion of current or proposed prices, the court found nothing unlawful in these assemblies. Significantly, the court stated in the Maple Flooring case that: "Trade conditions generally, as reflected by the statistical information disseminated among members, were discussed; the market prices of rough maple flooring were also discussed, as were also manufacturing and marketing conditions."[1] And in describing the meetings of

[1] *Maple Flooring Assn. v. U. S., op. cit.* Preliminary printing, p. 9.

the Cement Association it was noted, similarly, that, "There was no discussion at these meetings of current prices; no comment on conditions or as to prospect of market, production, or prices."[1]

In the third place, regarding the primary work of the defendant associations in assembling, compiling, and distributing trade information the court indicated its impression of the character of this activity by repeatedly comparing it to the reporting service of newspapers, trade journals, and even government agencies. The systems employed by the two associations were not identical, that of the Cement Association sharply distinguishing between the two principal classes of business done by its members. Upon so-called "specific job contracts" the members mutually agreed to report quantities, prices, deliveries, payments, and modifications conceded to the buyers. These contracts involved the sale of cement to be used in specific construction projects, and in order to prevent contractors from taking advantage of the cement manufacturers in periods of advancing prices by securing supplies in excess of requirements and diverting same from the work specified, the distribution of the foregoing detailed information was supplemented by the employment of "checkers" to verify the execution of these job contracts according to their reported terms. As to the bulk of the output of the members of this association, which was sold through dealers, it was covered only by monthly reports of production, shipments, and stocks on hand. The Maple Flooring Association compiled and distributed promptly to members complete data upon every sale made including date, specific items, prices, freight costs, and any commissions paid, but not identifying either the seller or buyer. Monthly reports upon production and stocks were also required.

In holding that these elaborate statistical services neither constituted nor implied a violation of the anti-trust laws, the Supreme Court decisions emphasize three elements which may serve to differentiate these cases from the Hardwood and Linseed cases. The character of the data assembled, the distribution of these data, and the use made thereof by mem-

[1] *Cement Manufacturers' Assn. v. U. S., op. cit.* Preliminary printing, p. 10.

bers of the association, either in or out of meetings, are the principal features upon which the earlier and the later cases seem to be distinguishable upon the basis of fact. In the first place, neither the Cement Association nor the Maple Flooring Association received or transmitted any "prices current," price quotations, list of effective prices, or the like, whether of an individual member or of a market summary. "All reports of sales and prices," said the court in the Maple Flooring case, "dealt exclusively with past and closed transactions."[1] Moreover, there was no identification of buyer or seller in the statistics given out by the Maple Flooring Association. Such identification did occur with respect to sales in that phase of the business of the cement manufacturers represented by the specific job contracts, but the court held that the manifest object of this requirement was the legitimate one of forestalling attempts at fraud by contractors.[2] In the second place, the statistical data assembled by these associations apparently were not treated as confidential information, as had been done in the Linseed case. On this point, the Court observed in the Maple Flooring case, "The statistics gathered by the defendant Association are given wide publicity. They are published in trade journals which are read by from 90% to 95% of the persons who purchase the products of Association members. They are sent to the Department of Commerce which publishes a monthly survey of current business. They are forwarded to the Federal Reserve and other banks and are available to anyone at any time desiring to use them."[3] While it did not appear that the statistics compiled by the Cement Association were published thus broadly, there is nothing in the official report to indicate that the information was not "available to anyone at any time desiring" it.

Finally, the court stressed the fact that in neither of these cases was there any evidence of the assumption of an obligation, either tacit or express, by member concerns to be guided in any particular manner in formulating their respective

[1] *Maple Flooring Assn. v. U. S., op. cit.* Preliminary printing, p. 8.
[2] *Cement Manufacturers' Assn. v. U. S., op. cit.* Preliminary printing, pp. 5, 12.
[3] *Maple Flooring Assn. v. U. S., op. cit.* Preliminary printing, p. 8.

business policies by the information provided through the association. It was in this respect, especially, that the Government failed to make out its case. Either from a misreading of the opinions in the Hardwood and Linseed cases, or from a bold and deliberate purpose to secure an extension of the scope of the prohibitions of the Sherman Act as previously construed, the Government chose to rest its case upon proof of the concerted activity in *providing* trade statistics of the character described. No effort was made, according to the Supreme Court, to adduce evidence of concerted activity in *making use* of such statistics, let alone of express agreements to that end. In this situation the court stated that the sole question presented was, "whether the combination of the defendants in their existing Association as actually conducted by them has a *necessary* tendency to cause direct and undue restraint of competition in commerce."[1] The conclusion was reached, in both instances, that no such necessary tendency resulted from the activities attacked. In the Cement case the Court declared, "the Government does not rely upon agreement or understanding and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred, and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."[2] Developing further this view in the Maple Flooring case the Court said, "But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce and its consequent effect in stabilizing production and price can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful."[3]

[1] *Maple Flooring Assn. v. U. S., op. cit.* Preliminary printing, p. 12. Italics in original.

[2] *Cement Manufacturers' Assn. v. U. S., op. cit.* Preliminary printing, pp. 13–14.

[3] *Maple Flooring Assn. v. U. S., op. cit.* Preliminary printing, p. 15.

Taken together, these two decisions dispel much of the uncertainty which has surrounded the statistical work of trade associations since the adverse decisions in the Hardwood and Linseed cases. The opinion in the Maple Flooring case gives full assurance that, "It was not the intention of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated. . . . Sellers of any commodity who guide the daily conduct of their business on the basis of market reports would hardly be deemed to be conspirators engaged in restraint of interstate commerce. . . . We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information, such as is here complained of, bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses."[1] The conclusion seems justified, upon the basis of this review of these recent decisions and of the excerpts quoted from the opinions, that the restrictive interpretation placed upon the Hardwood and Linseed cases by the Department of Justice and others was without warrant. Carefully construed the doctrine of those cases has not been departed from, but vindicated, in the Maple Flooring and Cement cases. The use of persistent propaganda and the insidious exertion of group pressure to secure conformity to uniform policies tacitly adopted by an association may, and probably would, still be regarded as evidence of unlawful conspiracy. Nevertheless, these recent cases are not without primary significance. They have not made lawful what was before unlawful; but they have established the lawfulness of activities concerning the legal status of which there had existed serious doubt in some quarters. It will not henceforth be possible to question, as it was possible for a time

[1] *Maple Flooring Assn. v. U. S., op. cit.* Preliminary printing, p. 16.

following the Hardwood and Linseed decisions, that a trade association may lawfully arrange for the interchange of statistical data among its members. The opportunity for mutual co-operation among business competitors in the provision of an adequate body of current information by the use of which trade conditions may be improved and markets stabilized, may not have been actually widened by these decisions. But the additional assurance they provide to those engaging in this line of activity, than which no other offers greater potentialities of usefulness, should lead to a considerable expansion of this sphere of trade association work.

CHAPTER IX

INTERCHANGE OF PATENT RIGHTS

§1. The Nature and Purpose of Co-operation in the Use of Patent Privileges

Since the basic function of a trade association is to serve as a clearing-house of ideas and information in the particular branch of industry with which it is concerned, it affords a natural channel for the interchange of that most valuable element of trade knowledge which is represented by patent rights. Essentially patents are nothing more than unique ideas, in the application of which, for a limited time, the originator or his transferee is granted a legal monopoly. These grants are made by the Government in the interest of public welfare—as stated in the Constitution, "to promote the progress of science and useful arts." Experience has demonstrated that the recognition and protection of the right of exclusive exploitation of a unique and original idea affords, on the whole, the most effective means of stimulating invention, and that the fruits of inventive genius, in spite of the temporary private advantage inherent in a system of legally established monopolies, are in the end made freely available to the entire community. But the establishment of distinct legal monopolies often leads to friction and disorganization within a given trade or industry. The mechanisms, devices, and processes represented by patents are numerous and varied. Because patent rights cover so many different ways of performing so many minute tasks, each producer, although protected in the utilization of his own discoveries, frequently finds himself balked at many points in improving his industrial processes. Indeed, one patent may be rendered quite useless—"blocked," as it is said—by another patent which covers a vitally related feature of the manufacturing process or of the finished product. Accordingly, a producer may be willing to sacrifice his own special privileges, in order to be rid of the obstructions resulting from the special privileges of his competitors. The bewilderment and confusion created in

many branches of industry by the existence of a congestion of patents can be alleviated only through voluntary co-operation; and the trade association constitutes the most readily available instrument for such co-operation.

Since the ideas which have been patented generally represent a very valuable part of "the stock in trade" of an industrial enterprise, one would naturally anticipate that these would be about the last element of trade knowledge to be put through the trade association clearing house. The very fact that a discoverer has deemed it desirable to secure letters patent would tend to preclude any disposition on his part to renounce his exclusive proprietorship. And, in truth, this will normally be the fact with regard to any basic invention. If the patent is fundamental, so that the patentee may exclude all others from manufacturing a given product, he will have no reason whatever to relinquish his special privilege. He may, of course, find it advantageous to license others to make and sell the article so protected; but in this case he will normally exact a royalty as high as the traffic will bear, which involves no limitation upon the exercise of his exclusive rights. But basic patents of this sort are rare. The "ninety and nine" are incidental. With reference to these patents, greater advantage may accrue, as far as each patentee is concerned, from the privileges obtainable in exchange for his contribution to a common fund of trade patents than he would derive from the sole exploitation of his own inventions; and the resulting benefits to the general functioning of the industrial structure may be far-reaching and substantial.

Even in the case of these so-called "minor" patents, there are many intricate and perplexing problems that must be settled in the formulation of an equitable arrangement for the interchange of patent rights. Most of the difficulties involved are economic in character and can be solved concretely only in the light of actual conditions in each trade. Are only the association members who are at the time holders of patent rights entitled to secure licenses under the patent pool? How many, and what kinds of, patent rights will make an association member eligible to participation in the pooling arrangement? Must each associate contribute all of his outstanding patents to the common fund? If not, what patent

rights may be reserved? Upon what terms are the cross-licenses to be granted? If quantity of output is to be restricted or royalty rates stipulated, upon what basis are these adjustments to be made? And if these adjustments are to be based essentially on the relative contributions of each of the associates to the common fund of trade patents, how is the worth of a patent or group of patents to be measured, for the purpose of determining the relative value of the several contributions? It is manifest that old and large firms strongly intrenched by numerous patents are not likely to be inveigled into a plan of co-operation whereby they are to share these privileges with a body of ambitious young rivals who have nothing to offer in return; and it must be apparent that the negotiation of an agreement for the interchange of patents bristles with practical difficulties. Accordingly, this line of associated effort is still in its early stages.

§2. The Legal Status of Restrictive Stipulations by Individual Patentees

Assuming, however, that these practical obstacles surrounding the funding of patent rights can be successfully overcome, what is the legal status of this trade association activity? Does it constitute a reasonable regulation of competition, designed to promote commerce and industry, or is it essentially restrictive in character, calculated to obstruct the free play of competitive forces and to impose upon the consuming public burdens falling without the legitimate scope of the patent monopoly? To answer these questions it will be necessary, first, to note the exact bounds of the exclusive privileges accorded to an individual patentee; then to examine the character of the additional limitations, if any, imposed by the anti-trust laws upon group action in the interchange of patent rights.

An individual patentee has the undoubted right to exclude all others from making, using, or vending the patented article, device, or process.[1] As sometimes expressed, he has the

[1] *U. S. v. American Bell Telephone Co.*, 167 U. S. 224 (1897); *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405 (1908); *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912); *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502 (1917); *U. S. v. United Shoe Machinery Co.*, 247 U. S. 32 (1918), 258 U. S. 451 (1922).

exclusive right to manufacture and sell goods embodying the patent. He may transfer this right in whole or in part;[1] or he may retain it without exercising it.[2] Should the patentee choose to license others to make, use, or sell the protected article, device, or process, he is at liberty to impose conditions upon the licensee. Normally the terms thus imposed serve but to protect the patentee in the enjoyment of his exclusive privileges. But there are well defined legal limits upon the character and scope of the conditions which may be incorporated in a license contract.[3] Restrictive covenants accompanying the transfer of patent rights, whether in the form of license agreements or otherwise, which tend unduly to restrict competition beyond the scope of the patent monopoly have been held to constitute violations of the anti-trust laws. This legal circumscription of a patentee's rights has afforded a fertile field for litigation. Moreover, the Clayton Act has definitely prohibited the imposition of certain types of conditions where the tendency may be substantially to lessen competition or to create monopoly.[4]

In the first place, a patentee cannot, in transferring to

[1] *Virtue v. Creamery Package Co.*, 227 U. S. 8, 32 (1913): "The owner of a patent has exclusive rights, rights of making, using and selling. He may keep them or transfer them to another—keep some of them and transfer others."

[2] *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405 (1918).

[3] *U. S. v. United Shoe Machinery Co.*, 258 U. S. 451, 463 (1922); "Undoubtedly the patentee has the right to grant the use of the rights or privileges conferred by his patent to others by making licenses and agreements with them which are not in themselves unlawful, but the right to make regulation in the public interest under the police power of the States or in the exertion of the authority of Congress over matters within its constitutional power is controlled by general principles of law, and the patent right confers no privilege to make contracts in themselves illegal, and certainly not to make those directly violative of valid statutes of the United States."

[4] Section 3 of the Clayton Act provides: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The Supreme Court has decided that these limitations apply to patents granted before, as well as to those granted after, the passage of the act. *U. S. v. United Shoe Machinery Co.*, 258 U. S. 451 (1922).

another the property in a patented article, lawfully fix the price at which the purchaser may resell or grant the use of the article.[1] Such a stipulation is deemed to be unnecessary to the protection of the legitimate interests of the patentee and tends to eliminate competition among subsequent sellers. Moreover, this rule applies not only to outright sales of the patented article or device, but also to any transaction, in whatever guise, which is in substance a sale, and whereby the patentee parts with his beneficial interest in such article or device.[2] A patentee, like any other property owner, is at liberty, of course, to constitute agencies for the marketing of his products, and in thus transferring the custody of his patented goods to a bona fide agent he does not forfeit his control over the terms of their disposition. But it has not infrequently occurred that patentees have sought to retain this control by nominally reserving title to the goods but actually divesting themselves of all the rights and responsibilities normally incident to ownership. Under such circumstances the law regards the substance rather than the form of the arrangement, and discountenances the practice of resale price maintenance just as definitely as when an absolute sale of the patented goods, without such formal reservation of title, has been consummated. In the Straus case, for example, the patentee, in transferring the patented phonographs to dealers, professed only to license such dealers to use them and to relicense ultimate consumers to use them upon specified price terms. In refusing to give validity to the price restrictions contained in these contracts, the Supreme Court declared: "Courts would be perversely blind if they failed to look through such an attempt as this 'License Notice' thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise. . . . It would be a perversion of terms

[1] *Bauer v. O'Donnell*, 229 U. S. 1 (1913).

[2] *Straus v. Victor Talking Machine Co.*, 243 U. S. 490 (1917).

to call the transaction intended to be embodied in this system of marketing plaintiff's machines a 'license to use the invention.'"[1]

This restriction upon price-fixing does not apply, however, to a genuine licensing arrangement, in which the licensee is granted the privilege of making and selling an article or device protected by patent rights. The licensor—that is, the patentee or his assignee—is privileged to stipulate not only a royalty as high as he chooses to exact, but also the number of patented articles which the licensee will be permitted to manufacture, where he will be permitted to sell them, and the prices he will be permitted to charge.[2] These privileges naturally flow from the basic rights vested in the patentee by his letters patent. They enable him to exploit his legally granted monopolistic advantages without extending their scope beyond the limits of the patent monopoly. What neither the licensor nor the licensee may lawfully undertake is to regulate the price of a patented article after it has been cast upon the stream of commerce. In other words, the exclusive rights vested in a patentee cannot be utilized as an instrument for restraining trade or achieving monopoly after they have been fully exercised and completely exhausted. It naturally follows, therefore, that it is beyond the legal power of a patentee, or of any one licensed to manufacture under his patent, to fix the terms of sale of unpatented goods, in the production of which the patented device may have been used by purchasers from said patentee

[1] *Ibid.*, pp. 500–501. The majority of the court concluded as follows: "Convinced as we are that the purpose and effect of this 'License Notice' of plaintiff, considered as part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of *Adams v. Burke*, 17 Wall 453, 456; and of *Bauer v. O'Donnell*, 229 U. S. 1; that it is, therefore, invalid, and that the District Court properly held that the bill must fail for want of equity."

[2] See *U. S. v. General Electric Co.*, Decree in Equity No. 8120, U. S. District Court, N. D. Ohio, October 12, 1911. In a second proceeding against the same company, involving similar issues, the court even more explicitly and emphatically affirmed the above propositions. *U. S. v. General Electric Co.*, Equity No. 1051, U. S. District Court, N. D. Ohio, E. Div., April 3, 1925. The assumption underlying this description of the sphere of control by a patentee over his licensee is that the commodity controlled is patented entire. The same privileges might not extend to an unpatented article in which the licensee is authorized to incorporate the patented device, or to which he may attach the patented device.

or licensee. And it is still further beyond the range of the patent monopoly for the patentee to attempt to control the prices of unpatented goods or accessories sold by a vendee in conjunction with the patented articles he has purchased. Since the power to control price which accompanies the grant of patent rights is designed primarily to promote the public welfare by providing an effective incentive to invention, the exercise of this power is restricted to articles or devices directly protected by letters patent, and only in so far as these articles or devices have not yet left the dominion of the patentee or his licensee.

In the second place, with regard to the stipulation of conditions of use, as distinct from conditions of sale which have just been considered, a patentee cannot lawfully impose upon a licensee to use his patented device or upon a purchaser thereof, the requirement that such device shall be used only in conjunction with materials or machines, patented or unpatented, furnished or prescribed by the patentee.[1] This means simply that the courts are unwilling to extend the exclusive privileges of the patentee beyond the immediate scope of the letters patent. Moreover, although the courts have reached this position more or less independently of express legislative action, the policy of the law is reinforced by the Congressional affirmation of the above stated rule in Section three of the Clayton Act. It is manifest that if the use of other articles or devices, patented or unpatented, were to be permitted to be "tied" to the use of the patented machine or process, the way would be opened to an undue restriction of competition in branches of trade not encompassed by the legal monopoly established through the patent law.

In the leading case involving an attempt, in this way, to extend the scope of a patent monopoly, it was held that the licensor of a patented cinema projector could not exact from licensee exhibitors a valid covenant to use in the projecting machine solely films manufactured or authorized by the

[1] *Motion Pictures Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502 (1917); *U. S. v. United Shoe Machinery Co.*, 258 U. S. 451 (1922). In these cases the former rule, as established in *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (1896), and applied in *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912), was overruled. A trenchant criticism, from the standpoint of public policy, of the earlier rule will be found in Chief Justice White's dissenting opinion in the Dick case.

licensor. Relying upon the language of the Federal patent law,[1] and upon the well-established rules evolved in its interpretation,[2] the Court declared: "The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restrictions of the law relate to the useful and novel features of the machine which are described in the claims of the patent: they have nothing to do with the materials used in the operation of the machine; while the notice restrictions have nothing to do with the invention which is patented, but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only, and it cannot with any regard to propriety in the use of language be termed a restriction upon the use of the machine itself."[3]

It should be observed, however, that without contravening the foregoing doctrines, a patentee, in licensing another to manufacture and sell his patented article, is within his legal rights in prescribing the style, quality, or other features of the product.[4] It is altogether reasonable, under such circumstances, that the conditions and methods of manufacture should be within the patentee's control. He has a direct interest that the reputation for serviceableness of his patented article should not be impaired, and therefore that its manufacture should be uniform and the finished product in accord with his design. Until manufacture is complete and the dominion of the licensor has been relin-

[1] Revised Statutes, sections 4884, 4886.

[2] *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274 (1877); *Railroad Co. v. Mellon*, 104 U. S. 112, 118 (1881); *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 559 (1886); *McClair v. Ortmayer*, 141 U. S. 419, 424 (1891); *U. S. v. American Bell Telephone Co.*, 167 U. S. 224, 239 (1897); *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 424 (1908); *Bauer v. O'Donnell*, 229 U. S. 1, 10 (1913); *Pennock v. Dialogue*, 2 Pet. 1 (1829); *Kendall v. Windsor*, 21 How. 322 (1859); *Grant v. Raymond*, 6 Pet. 218, 241 (1832); *Winans v. Denmead*, 15 How. 330 (1853).

[3] *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502, 512–513 (1917). The defendant in this action was sued as a contributory infringer.

[4] The authority most nearly in point is *Westinghouse Co. v. Fibre Co.*, 268 Fed. 121 (1921). In this case the patentee's asserted rights extended beyond those indicated above. A provision in a contract of license to manufacture a patented article requiring the licensee to purchase certain material used in such manufacture exclusively from the licensor was held valid and enforceable.

quished, the article has not passed beyond the domain of the patent monopoly—it has not entered the field of trade, wherein the principle of competition resumes its normal sway. Furthermore, it appears that a licensor, in licensing a patented device for use in the manufacture of unpatented goods, may lawfully stipulate the kinds and grades of products to be made with it or upon it, assuming it to be adaptable to various uses. It should be noted, however, that permission to embody such conditions in a lease of patented machines might conceivably be abused, in some instances, as a means of circumventing the prohibitions of the Clayton Act with regard to restrictive leases. To prescribe that a lessee should make only products of a given grade in utilizing the patented device might well have the effect, under certain circumstances, of a stipulation that the raw material should be purchased exclusively from the lessor.

§3. The Legal Status of Restrictive Stipulations Through Concerted Action

In coming, now, to a consideration of co-operative plans for the interchange of patent rights among a body of trade competitors, it may first be noted that there are various arrangements by which such plans may be made effective. The several members of the group may assign their patents to a trustee for the benefit of all, reserving such measure of control over the distribution of privileges as is deemed expedient by the terms of the trust deed. The same end may be accomplished by an arrangement whereby the associates retain their individual patents but grant licenses generally to their associates to use the patented device or embody the patented feature in their products. This is done, of course, on condition that each will receive reciprocal rights. Or, again, a new corporation may be set up, which is empowered to become the assignee of all patents, and is authorized to issue licenses upon pre-arranged terms agreed to by the associated patentees who are its stockholders. It is apparent that the instrumentalities through which the interchange of patent rights may be effected are diverse; but from the standpoint of public policy the character of the formal arrangement is of minor impor-

tance. It is what is sought to be accomplished by this species of trade co-operation that serves to determine its status under the anti-trust laws. Is the plan designed to make technical improvements available to all producers—advancing thereby the immediate interests of the given branch of industry in its economic contest with producers of alternative goods and ultimately increasing its service to the common weal? Such an objective would appear to be not only legitimate but commendable. Or is the arrangement but a device for reducing or eliminating competition among the producers of unpatented goods made by sundry patented processes, or among the producers of distinct but alternative patented commodities? Under such circumstances, the fact that the confederates have acquired joint control of numerous patents will not enable them to evade the prohibitions of the anti-trust laws.

In the beginning, just as the imposition of unduly restrictive covenants by an individual patentee upon a licensee to use a patented article was upheld,[1] joint action by the owners of patent monopolies was permitted to proceed to apparently restrictive extremes. In the earliest case involving this type of trade co-operation to reach the Supreme Court, a judgment was rendered which might have appeared tantamount to a declaration that patentees, being vested with exclusive privileges by law, are thereby placed beyond the reach of the Sherman Act, had not the court itself expressly denied that it so held.[2] In this case the principal, if not all, the manufacturers of spring-tooth harrows had become associated in interest through the National Harrow Company. This corporation was formed to receive the assignments of all the patents for the construction of harrows under which its members operated; but instead of providing for cross-licensing—that is, the licensing back of the associates to manufacture under any of the assigned patents—the arrangement was simply that each manufacturer became the licensee under the several patents he had assigned, and under no others. A uniform stipulation was made in each of these license contracts that the

[1] *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (1896); *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912).

[2] *Bement v. National Harrow Co.*, 186 U. S. 70 (1902).

manufacturer should sell the harrows made under the patents he was licensed to use (and which he had originally procured himself) at a scale of prices prescribed by the National Harrow Company. This provision disclosed the essential character of the entire scheme. It was so manifestly designed simply to eliminate competition in the sale of harrows that two lower federal courts, in separate actions, had declared the association of the score or more manufacturers in the National Harrow Company, a combination in restraint of trade.[1] In both these instances the courts had refused to extend their aid to secure the enforcement of the terms of the license contract which the defendants had disregarded. The litigation in the principal case arose in the same way and upon essentially identical facts. Yet the Supreme Court allowed the plaintiff combination to maintain its action.[2] "The first important and most material fact in considering [the validity of the license contracts sued upon]," said Justice Peckham, "is that the agreements concern articles protected by letters patent of the Government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring-tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress."[3] In fact, however, the plaintiff was

[1] *National Harrow Co. v. Quick*, 67 Fed. 130 (1895); *National Harrow Co. v. Hench*, 76 Fed. 667 (1996), affirmed 83 Fed. 36 (1897).

[2] This decision appears to have guided the lower federal courts in two subsequent cases: *Rubber Tire Wheel Co. v. Milwaukee Rubber Co.*, 154 Fed. 358 (1907); *Indiana Manufacturing Co. v. Case Machinery Co.*, 154 Fed. 365 (1907). See, particularly, concurring opinions by Judge Grosscup. Very recently, in a case involving copyrights rather than patents, a lower federal court has by inference embraced a similar doctrine: *Harms v. Cohen*, 279 Fed. 276 (1922). All of these cases were suits for infringement. In each of them it might have been an adequate answer to the defense of illegal conspiracy in restraint of trade, to have pointed out that the defendant was in no position to urge this fact as an excuse for infringement. This the court did in the last-mentioned case, observing tersely that "there is no provision in the Sherman Act divesting members of combinations in restraint of trade of their property." But in all of the cases the court felt impelled to undertake the burden of justifying the plaintiff combination or the alleged conspiracy to which it was a party.

[3] 186 U. S. 88. The precise words of the referee, upon whose report the court was relying, were: "At the date of the execution and delivery of the license contracts A and B, the National Harrow Company of New York was the owner *by assignment and purchase* of a *large number* of United States letters patent, which it is claimed *fully monopolized* and covered defendant's float spring-tooth harrow business." No italics in original.

the owner of a series of distinct legal monopolies, each limited in its scope and significance. It became sole owner of these diverse patent rights through voluntary agreement; absolute monopoly was achieved through the process of combination. This latter monopoly, of course, had never been recognized by the Constitution or sanctioned by Congressional action. It must be added, however, that the Supreme Court insisted that in the record before it there was no evidence of the co-existence of agreements between the plaintiff and other harrow manufacturers similar to the agreement between the parties to this suit.[1] And, of course, if there had been no combination, the transaction between plaintiff and defendant would have been a lawful contract, beyond question.

In due course, however, the Supreme Court came to recognize the truth that the whole may be greater than the sum of its parts—in social and economic affairs, if not in mathematical science. A decade later it was presented with a substantially similar issue from the sanitary plumbing fixture industry.[2] The sixteen companies, defendants in this action, were the manufacturers of approximately 80 per cent of the enameled iron ware made in the United States. Through the ingenuity of the secretary of their trade association, the several defendants possessing patents covering the enameling process were prevailed upon to transfer their letters patent to him. It appeared that these were not absolute assignments, however, for under the operation of the plan, the prices charged for enameled ware manufactured by the association members under licenses issued by the association secretary were controlled, not by the secretary as licensor, but by a

[1] P. 95: "But," said the court, "there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found." The court appears to have overlooked, however, the fact that contracts A and B between plaintiff and defendant, which were signed and executed in pursuance of an escrow agreement, could not have had any validity or effect in the absence of the execution of like contracts with the other manufacturers mentioned.

[2] *Standard Sanitary Manufacturing Co. v. U. S.*, 226 U. S. 20 (1912).

committee of the manufacturers representing the licensees. It was provided that 80 per cent of the royalties stipulated in the licensing agreement should be refunded, after three months, to the licensees who had abided by the price schedule and other terms of the contract, including an engagement not to offer "seconds"—that is, alleged inferior ware—on the market.[1]

The Supreme Court condemned this arrangement as a simple conspiracy to raise prices, under cover of lawfully exercising patent privileges. The court said: "Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others not to sell their product to the jobbers except at a price fixed not by the trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sale were created. . . . The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law."[2] The position of the court may be summed up in the incisive words of the district judge in the same proceeding: "The ownership of a patent for a tool by which old, well-known, and unpatented articles of general use can be more cheaply made gives no right to combine the makers and dealers in the unpatented articles in an agreement to make the public pay more for it."[3]

This doctrine appears to have been upheld in a more recent proceeding which did not reach the Supreme Court.[4] The

[1] The character of the arrangement is clearly revealed by the following facts as described by the District Court (191 Fed. 174–175):

"Each corporate defendant promised to do three things: It would not sell any of the 'seconds' or 'B's' of any of the ware except bathtubs. . . (2) It would not sell any ware to any jobber who did not sign the jobber's resale agreement. . . (3) It would not sell anybody any ware at a lower price or upon more attractive terms than those named in the agreement or a schedule attached to it. The schedule named standard prices for each article of the ware and for each size, shape and grade of that article. All the corporate defendants promised that they would not sell some articles below the scheduled price. Some of them undertook not to sell any articles below these prices. . . . The negotiation [of these matters] was finished. . . before any of the patents had been put in [the secretary's] name."

[2] 226 U. S., 47–48.

[3] 191 Fed. 172, 192 (1911).

[4] *U. S. v. Discher et al.*, 255 Fed. 719 (1919).

defendants, comprising the ten principal makers of automobile bumpers, formed in 1917 the Automobile Bumper Association. By the articles of association each company pledged itself to assign all its mechanical patents covering the manufacture of bumpers to a Massachusetts trust estate, the trustees of which were to be representatives of the association members, one for each company. It was provided that each member, in return for the assignment of whatever patents it possessed and the promise to assign whatever patents it might acquire, should be entitled to receive a blanket license to manufacture bumpers under any and all patents vested in the association trustees. The royalty fixed was five per cent of gross sales, to be accounted for monthly. Forty per cent of the royalty receipts were to be set aside toward the accumulation of a capital fund for the so-called trust estate. Forty-five per cent were by the original agreement specifically designated for payment to the Gemco Manufacturing Company and the Central Brass and Fixture Company jointly, these two concerns being the owners respectively of the Discher and the Turner and Crabill patents. The assignors of the other patents, concededly of minor importance, were to be allowed to share in the remaining fifteen per cent of the royalty receipts upon terms to be negotiated with the trustees. Furthermore, the following provision was included in the trust agreement: "The trust estate shall from time to time so far as it may lawfully do so determine the minimum prices at which any articles manufactured under said Letters Patent or licenses shall be sold by the respective licensees and the terms and conditions and policies which shall obtain with respect to the selling of said goods."[1] Within a year after this plan was put into execution it attracted the attention of the Department of Justice. The charge of the Government that this arrangement for the cross-licensing of patent rights constituted a combination in illegal restraint of trade was not denied by the defendants, and a consent decree was entered dissolving the Automobile Bumper Association and the trust estate.

How far does this case, considered in conjunction with the

[1] Exhibit A of the United States, in Equity Petition No. E 14-393, U. S. District Court, S. D. New York, filed Dec. 4, 1917.

Standard Sanitary Manufacturing Company case, delimit the opportunities for legitimate and practical interchange of patent rights? These being the only recorded cases directly in point upon trade association activity of this character,[1] their analysis will necessarily have to be supplemented by reference to the general principles of patent law previously set forth.

It may be noted, in the first place, that in each of these instances the association exercised the stipulated right to fix the prices at which articles manufactured under any of the funded patents by the several licensees should be sold. It seems clearly to be a right of an individual patent holder, in licensing another to manufacture a patented article, to fix the price at which it may be sold. This enables him to exploit his own legal monopoly, without eliminating competition between alternative patented products. But when all or most of the patents relating to a given branch of manufacture are vested by agreement in a single body, the admission of a like privilege to the patent licensor would confer a power to con-

[1] In 1922 and 1923 several of the large refiners of petroleum, possessing patents upon various features of the process and apparatus for making "cracked" gasoline, entered into a series of contracts which granted immunity each to the other respecting their several patent claims. These contracts waived damages for any infringement of the patents held by each party, not only in the operations of the several other parties, but also in the operations of their respective licensees. Graduated royalties were provided for in the licensing contracts.

In June, 1924, the government attacked this cross-licensing system as an agreement in restraint of trade. *U. S. v. Standard Oil Co. et al.*, Bill in Equity, No. 4131, in District Court, Northern District of Illinois, Eastern Division. It was contended that the patents were inconsequential and that the entire scheme was a mere blind for restricting the output and raising the price of gasoline. The defendants have answered that the patents in question, while not basically controlling the distillation of gasoline from heavy oil under pressure at high temperatures, do represent important improvements in the art. The cross-licensing contracts were entered into in good faith, they insist, to avoid long and expensive litigation which might well have eventuated in the determination that the patents in dispute were over-lapping. The resulting condition of mutual inhibition would have been insufferable from every point of view, it is contended. Not until the courts have heard the testimony in this proceeding will it be possible to say what is the exact nature of this cross-licensing arrangement, but in any case it does not involve trade association activity, in the strict sense.

Similarly, in a pending action by the Federal Trade Commission, under Section 5 of its foundation act, against the Radio Corporation of America and others (Complaint No. 1115, Annual Report F.T.C., 1924, p. 223), the respondents are charged with having pooled their patents and having mutually restricted production. This proceeding is based upon an investigation of the radio industry made by the Commission in 1923. Like the petroleum refining case, above, it lies somewhat outside the sphere of trade association action. See Report of the Federal Trade Commission on the Radio Industry, Washington, 1923.

trol the prices of the products of that industry which no single patent holder could have approached. Under such circumstances the competitive interests of the several patentees become unified—a monopolistic combination is superimposed upon the substructure of independent legal monopolies. Accordingly, although an individual patentee, acting independently of other patentees, may prescribe the price at which a licensee to manufacture must sell, the law may interfere when a trade association, in arranging for the common exploitation of the funded patents of its members, attempts to control the prices charged by the licensees for products embodying any of the patented features. And this restriction applies with the greater force to a situation in which the patents relate not to the products themselves, but to devices or processes employed in their manufacture, as was disclosed in the so-called Bathtub case.[1] In these circumstances not even an individual patentee possesses the privilege of dictating the prices of the products made in whole or in part with the patented machine which he has sold or leased to a manufacturer or licensed him to construct and use. There can be no question, therefore, that a trade association, in licensing its members to employ any or all of a fund of patents covering machinery and methods of production, is ill-advised if it attempts to stipulate the prices at which their products shall be sold.[2]

[1] *Standard Sanitary Manufacturing Co. v. U. S.*, 226 U. S. 20 (1912).

[2] In the foregoing discussion it has been assumed that the patents funded or the patent rights interchanged related to products serving the same purpose or having similar uses. In other words, the assumption was that the patents were so-called competitive patents. Whether a like conclusion would follow if a group of patentees should attempt to fix or negotiate a price schedule for articles covered by their several funded or interchanged patents when these patents were in no sense competitive patents is not altogether clear. It may be argued that there could be no diminution of competition by permitting manufacturers in a line of trade which comprises sundry related but distinct or non-competitive products to fix by negotiation the prices to be charged upon the several different patented articles, the patent barriers upon which, as among the associates, were thrown down by agreement. The monopolistic control exercised over the market price of each patented article could in no degree be enlarged, it might be contended, by an arrangement which, in effect, merely shifts that control from the individual patentee to an association in the trade. But whether the courts will finally distinguish this situation and confine the restriction upon the price-controlling power of patentees to agreements involving competitive patents, it would be hardy to predict. It should be observed, however, that the Supreme Court, in upholding the validity of the outright consolidation of the interests of numerous patentees in the shoe machinery industry, strongly stressed the fact that many, if not most, of the patent rights there involved

On the other hand, it appears on principle to be unobjectionable for a licensor under a trade association agreement for cross-licensing to exact a royalty in return for the patent rights conferred. While the court records do not seem to provide any authority on this precise issue, it is a noteworthy fact that such a reciprocal licensing agreement existed for many years in the electrical goods industry without being attacked on these grounds. Moreover, there is in force at present in the aircraft industry an agreement for the joint use of patents upon a royalty basis. Once the validity of cross-licensing with agreed royalties is granted, there seems to be no adequate ground upon which a court could undertake to assess the reasonableness of the amount exacted. The power thus exercised by a patentee does not extend beyond the authority vested in him by his letters patent. The restriction he imposes thereby upon the competitive adjustment of supply to demand is no greater than is necessary to secure the enjoyment of his legal monopoly. The final price to be charged for the product resulting from the use of his patented device or process is determined by competition among rival producers. Each licensee is free to produce as many units of the goods embodying the patent as can, in his own judgment, be advantageously disposed of on the market, the price being competitively determined, and covering not only the fixed royalty cost which he bears equally with other

related to successive phases of the process of shoe manufacture. *U. S. v. Winslow*, 227 U. S. 202 (1913); *U. S. v. United Shoe Machinery Co.*, 247 U. S. 32 (1917). The fact that the patents thus brought under a unified control were in large measure non-competitive seems to have been regarded as the most significant feature of the combination determining its legal status. In the Winslow case the court declared: "It is said that from 70 to 80 per cent of all the shoe machinery business was put into a single hand. This is inaccurate since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendant's share in commerce among the States does not appear. But taking it as true we can see no greater objection to one corporation manufacturing 70 per cent of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each." (p. 217). This passage is quoted with approval in the shoe machinery case cited above, and the court continued, adopting the words of the District Court: "The combination was not unlawful so far as it did no more than put the different groups of non-competing patented machines into one control . . ." 222 Fed. 349, 365 (1915). These opinions clearly reveal that the courts are aware of the distinction here suggested; but as to how far the distinction will be allowed to guide their judgments with reference to the validity of price fixation by a group of patentees not consolidating their several business interests, but only funding their several patent rights, is still a matter of speculation.

producers, but also the remaining costs which are variable among the several competitors. To insist upon an extension of this freedom of opportunity on the part of licensees or upon a further restriction of the authority of licensors would run counter to the public policy expressed in the patent laws, as deliberately formulated and rigorously enforced for more than a century and a quarter.[1]

But the most comprehensive cross-licensing plan of proved feasibility now in operation— that sponsored by the National Automobile Chamber of Commerce—contains no provision for royalty payments.[2] A brief description of its main features will serve to illustrate the freedom and advantages of trade co-operation in this field which still remain available when the practical difficulties and legal pitfalls of royalty exactions are avoided. The plan of the automobile manufacturers, known as the Cross-Licensing Patents Agreement, was put into execution in 1915, following the long litigation over the Selden patents. In the words of the General Manager of the National Chamber: "The great broad feature of this whole plan is the fact that any automobile company that has been in production for a year or more, which has a proper standing in the trade, and which conducts its business in legitimate fashion, is made welcome to the Chamber and given the rights under all the patents of the other members who are parties to the agreement. In return it contributes rights under such patents as it has and such patents as it takes out prior to 1925."[3] The patents covered by this agree-

[1] The foregoing reasoning is based upon the hypothesis that the patent holding members of the association retain title to their letters patent, simply agreeing to grant licenses generally to the trade upon fixed terms or terms to be negotiated. If they pool their patents under an arrangement for a joint control of royalties to be charged on each patent, it might well be that the courts would construe the plan as an extension of the patent privileges beyond the scope of the government grant and bordering upon restraint of trade. Even under such circumstances, however, it would probably require an unreasonable exertion of the right to assess royalties jointly in order to amount to an infraction of the anti-trust laws.

[2] Two exceptions to this broad declaration should be noted. First, all members exercising privileges, upon a royalty basis, under patents owned by others, and enjoying the right to relicense them, are bound to fix royalties corresponding to those to which they are themselves subject as original licensees. Second, the National Chamber, since the inception of the plan, has in several instances secured from nonmember patentees the right to license under their patents upon a royalty basis. Members electing to manufacture under such patents are required to reimburse the National Chamber for such amounts as it has engaged, solely upon an output basis, to pay the respective patentees by way of royalties.

[3] Alfred Reeves, "How Automobile Men are Banded Together," *New York Evening Post*, March 27, 1922.

ment are what have been described as "development patents" —that is, refinements of the art as at present practised—and they relate, in the main, to matters of detail, some of which are of substantial importance. Two classes of patents are expressly excluded from the operation of the plan. Design patents, since they embody the distinctive features by which a given manufacturer's product is identified by the general public, are not funded. Basic or "radical" patents are also exempted from the pool. The line of distinction here is admittedly a tenuous one, but in practice it has not been found difficult to draw it.[1] The significant characteristics of this agreement, from the standpoint of public policy, are these: that no royalties are provided for, and that no attempt is made to stipulate the prices to be charged by the licensed manufacturers. Nevertheless, over 600 patents had been submitted by the members of the Chamber for cross-licensing by the beginning of 1922, and it is stated that the number now covered by the agreement exceeds 1,000. These patents have been contributed by upwards of 125 manufacturers subscribing to the plan. While the benefits to the industry and to the public from the improvement of motor cars which has been facilitated by this interchange of patent rights are not capable of precise appraisal, there is a general consensus of informed opinion that these benefits have been both substantial and significant.

The chief obstacle to any patent-interchange agreement incorporating the valuation principle is economic rather than legal. The verdict of those who have had longest experience in this branch of association work is that any arrangement involving the mutual assessment of the relative worth of numerous minor patents, or the negotiation of the amount of royalties to be paid under each specific patent as it appears, is bound to prove unworkable. The mere routine necessitated by the assessment of royalties would of itself tend to preclude the adoption of such a plan in many industries, for the number of patents granted annually in several fields

[1] It appears that in only one instance during the nine years in which the cross-licensing agreement has been in effect has it been necessary to constitute an arbitration board to adjust the classification of a submitted patent. There are some manufacturers of air-cooled motors, however, who have declined to come in under the agreement.

has mounted into the hundreds and even thousands. It is asserted that there are at present outstanding some 250,000 patents generally or specifically applicable to the manufacture of automobiles or their accessories. The impracticability of any attempt to evaluate so large a number of patents and fix royalities for their common use is obvious. Probably much more than a majority of them are not worth the expense of a suit to enjoin infringement. But even if it be assumed that all create valuable privileges, it is simply beyond the range of human goodwill and bargaining capacity to effect an agreement among numerous rival manufacturers upon the relative merits of their respective patent holdings. And as new patents are issued from time to time, requiring new negotiations and affording opportunities for renewed conflict, the likelihood of long-continued co-operation on this basis is manifestly negligible. In the automobile industry, which provides the most noteworthy example of a cross-licensing agreement which has continued to function smoothly over a period of years, there is no attempt to fix royalties, as we have seen, under any one or all of the patents over which authority to grant licenses is vested in the national association. Indeed, the sum and substance of the plan is simply this: in exchange for the assignment to the Chamber of the right to license under all his own patents of the stipulated character, each manufacturer subscribing to the agreement receives a promise of immunity from infringement suits by reason of his having at any time, either deliberately or inadvertently, incorporated in his product some feature upon which a patent may be held by some other member of the association. There is a total absence of any purpose to secure price control, either directly or through the adjustment of royalties.

The legal restrictions upon price control which may be effected in conjunction with the interchange of patent rights are equally applicable to the control of production through such a medium. It does not follow, because an individual patentee is permitted to restrict each of his licensees to manufacture to a stated quantity of production, that he may lawfully enter a combination whereby each member holding patents will cross-license every other member on condition

that each of the licensees be restricted to a fixed production schedule. Such an agreement operates to fetter unduly the individual action of each patentee, and in the light of the general principles already discussed, it seems clearly beyond the range of legality. Ancillary controls, such as a requirement that a licensee under a given patent must also become a licensee under one or more other patents, must likewise be deemed unlawful.

§4. The Opportunities for Co-operation Through Interchange of Patent Rights

What remains of patent privileges if such features of a patent interchange plan as we have shown to be clearly unlawful or of doubtful legality are avoided? Essentially only the basic rights conferred by the letters patent are reserved: the right to exclude outsiders—that is, non-members—remains unimpared. Only those who contribute something, or whose promise to contribute something to this common fund of trade knowledge (inventions) is deemed to entitle them to participate, can have access to these pooled patents and secure their benefits. It should be noted, however, that the concern originating a patentable feature or method still retains some portion of the special advantage which springs from being an innovator, even as against the associated members. Though the patentee complies in good faith with the exchange agreement, there is bound in practice to be some priority in use of the device or process in his favor. Weeks and often months may elapse before the subscribing manufacturers will have been able to study the practicability of the innovation, procure the license, and make the necessary adaptations in their factory operations. The initial advantage thus retained by the patentee often exhausts the substantial benefits to be derived from minor patents; but whether it does so or not, it operates as a large inducement toward their development. These considerations, in addition to the dominating factor already mentioned whereby each secures, in exchange for limited rights, numerous and extensive privileges, have led to the creation, in spite of grave practical difficulties, of workable plans for group interchange

of patent rights. And perhaps it should be noted, also, that considerable advantage has accrued from the avoidance of vexatious and expensive patent litigation.

In conclusion, it is submitted that reciprocal open licenses among trade association members serve to intensify competition rather than to suppress it. The common utilization of technical knowledge by trade rivals, within limits mutually agreed upon, tends to remove legally established differential advantages and to secure to the consuming public the full benefits of technological progress. The cross-licensing arrangement in the automobile industry has certainly exhibited no tendency to stifle competition among the associated manufacturers. And even when provision is made for the payment of royalties, assuming that they are not fixed in collusion, there seems to be no sound reason for considering a patent interchange agreement as in any sense subversive of the competitive process. It is not the co-operative action involved in the system of cross-licensing which jeopardizes the public interest and is contrary to public policy. It is only the concerted imposition of restrictive conditions upon the production and sale of goods manufactured under patents, and upon the use of patented devices and processes, which runs counter to the demands of public policy and is subject to condemnation. Divorced of such restrictive conditions, agreements for the interchange of patent rights provide a promisingly fertile field for constructive and legitimate trade association activity.

CHAPTER X

INTERCHANGE OF CREDIT INFORMATION

§1. The Nature and Purpose of Interchange of Credit Information

Perhaps there is no other sphere of business co-operation in which a longer record of fruitful experience may be pointed to as a demonstration of the advantages of associated action than that of co-operative counsel, based largely upon the interchange of information, in the granting of credit and in the adjustment of credit terms. Much of this experience, it is true, has been of a quite informal character, creditors merely making special inquiries of representative concerns, frequently but not always their own competitors, with regard to their estimation of, or actual record with, particular prospective debtors. Where resort to such inquiries became a fairly usual practice, there almost invariably sprang up some type of central organization, and standardized forms of eliciting information were evolved, in order that the routine work of reporting might be minimized as far as possible, and equality of credit treatment for all concerned might be measurably approached. But even when such developments took place, the co-operative efforts seldom involved the active participation of the responsible executives of the various independent establishments whose credit sales were thus fortified. These arrangements were more often the outcome of the spontaneous activity of subordinate officers, like treasurers or credit managers, to lighten their personal burdens of administrative work. Moreover, in the relatively unspecialized stage of retail trade development prevailing in many sections of the country until very recent years, credit co-operation was frequently not confined to single industries or lines of trade, but encompassed most of the types of business represented in a given region. Locality, rather than trade, was the common basis of associated efforts in this

direction—and to some extent credit co-operation is still maintained along these lines.[1] For various reasons, therefore, the story of the development of business co-operation in the safeguarding of credit-granting cannot be identified with the rise of trade associations. It was only as the earlier modes of exchanging credit information broke down, with increasing specialization in trade and progressive expansion of market areas, that trade associations came to find in this activity a distinct opportunity for genuinely helpful service to their members. Latterly, however, it has become an increasingly common feature in the program of trade association work; and in not a few associations it is now the most prominent single line of activity.

Since this study is primarily concerned with questions of public policy, there is no need of undertaking here an extensive discussion of the methods employed in gathering and distributing credit information, or of the forms of organization which are utilized in the performance of this function. It will suffice to indicate that these methods and forms of organization are by no means uniform among all associations and to describe their general character. The various methods employed generally conform to two types. One of these types confines itself to the accumulation of the actual "ledger experience" of the associated members with particular patrons. This credit information serves to show the amount of a prospective customer's normal purchases, the frequency of his purchasing, the stability of his custom, and the promptness of his debt-liquidation. Unless such information is exhaustive of all the accounts reflecting the credit-seeker's current operations, it is an inadequate guide as to the immediate solvency or general strength of his financial position. The other type of procedure in eliciting credit information involves the assembly from all pertinent sources of judgments concerning the credit-applicant's character, business capacity, and financial responsibility, and these data are commonly supplemented by a direct statement of resources and liabilities. This type of co-operation seeks to secure

[1] Witness, for example, the characterization of different methods of organizing schemes for the interchange of credit information as the "Minneapolis plan," the "New Orleans plan," etc. Cf. Hagerty, "Mercantile Credit," New York, 1913, pp. 170–183.

enlightenment on the moral hazards involved, as well as information concerning the concrete circumstances of the prospective purchaser. Moreover, it is manifestly calculated to avoid the necessity of calling upon members of the trade association to reveal to outsiders (whether or not the information will, in ordinary course, be transmitted to their competitors) the details of their transactions with their customers —information which many business firms are either reluctant to disclose or refuse to disclose altogether. The forms of organization through which these co-operative methods are carried out likewise vary from association to association. In some cases, particularly when the associations are relatively small, the central staff dealing with credit matters may be merely an adjunct of the secretary's office. Commonly, however, the work involved in the interchange of credit information is of such scope and character as to warrant the establishment of a more or less autonomous bureau directly responsible to the executive committee of the association. But there are still numerous instances of outside organizations conducting this credit service for profit, the trade association merely urging its members individually to subscribe to the one agency.[1] Under these conditions the credit service received by the associates can scarcely be reckoned as among the distinctive fruits of trade association effort. With this brief survey of the modes of organization and methods of operation for the interchange of credit data, a discussion of the status of this very common trade association activity under the anti-trust laws is now in order.

§2. The Validity of Credit Services

Of the lawfulness of the assembly of information regarding the financial standing and personal character of applicants for credit, and the delivery of this information concerning particular parties to credit grantors upon specific request, there has never been the slightest doubt.[2] It goes without saying that such information must not be deliberately falsi-

[1] See, for example, the resolution of the National Wholesale Coal Association recommending subscription to an independent but specialized bureau. *Coal Trade Journal*, vol. 54, p. 538.

[2] *Eaton v. Avery*, 83 N. Y. 31 (1880); *State v. Morgan*, 2 S. D. 32 (1891).

fied or maliciously published, else those who give it and those who distribute it may find themselves liable for misrepresentation or for defamation.[1] But the reasonably diligent assembly of honest facts by lawful means, and the distribution of such facts for a consideration, have long been recognized as legitimate undertakings.[2] Nor does the assumption of this commercial function by a body of credit grantors with like interests operate of itself to carry the activity of the group beyond the protection of the law, and much less into the zone of its prohibitions.[3] Co-operation in such matters does not tend, in any vital respect, to narrow the sphere or to diminish the intensity of trade competition. Each seller is left free to grant credit or to refuse it—and if he grants it, to do so upon terms as onerous as he may be in position to impose, or as lenient as he may be required to hold forth. On the contrary, in so far as such co-operation, because of the intimate knowledge of the associates concerning the conditions of the trade and the character of those who participate in it, serves to eliminate unsound extension of credit and to stimulate the adjustment of credit terms in conformity with the real status of buyers and sellers, the competitive process is rationalized thereby and its normal unfolding is rendered more effective. The organization and operation, under joint auspices, of the indispensable machinery for interchange of credit data, only facilitate the removal of the competitive scramble on the part of individual firms to keep better informed of the credit status of customers than do rival concerns. And since, not infrequently, this scramble still further degenerates into hectic efforts by interested creditors to mislead their competitors, the substitution therefor of systematic co-operation in providing a sound basis for credit-granting all along the line but constitutes a method of regulating competition which clearly falls within the recognized limits of the "rule of reason." The parties in immediate interest, and ultimately the consuming public, are the beneficiaries of more intelligent business policy, and no public interest is directly jeopar-

[1] *Bank v. Ludlum*, 49 Minn. 344 (1891); *Patterson v. Evans*, 153 Mo. App. 684 (1915); *Northwestern Detective Agency v. Winona Hotel*, 179 N. W. 1001 (Minn., 1920).

[2] *Xique v. Bradstreet*, 70 Hun. 334 (N. Y. 1893), affirmed, 141 N. Y. 605 (1893).

[3] *Putnal v. Inman*, 80 So. 316 (Fla., 1919).

dized. The forces of healthy competition are left essentially unimpaired.[1]

But when co-operation is thus established and competition is thus regulated, there are always possibilities of insidious encroachments upon the public interest, or upon the private interests of third parties. The perversion of such legitimate activities is not inevitable; but in so far as no adequate deterrent exists under such circumstances in the spontaneous play of economic forces, the law aims to supply the needed protection against unduly restrictive contingencies. Business co-operation of this character must ever be tested by the reasonableness of the means adopted and by the genuineness of the adherence of the associates to the professed ends. In what ways, specifically, is the practice of interchanging credit information subject to the perpetual possibility, if not the "dangerous probability," of departing from the clearly lawful province described above?

§3. Agreements or Understandings to Withhold Credit

An agreement among credit grantors not to extend credit to applicants failing, on the basis of the facts revealed by the credit bureau, to satisfy certain minimum standards is perhaps the most natural concomitant of the co-operative work involved in ascertaining the credit standing of trade customers. Is such an agreement unlawful under the Sherman Act? The issue does not yet appear to have been

[1] In a recent case it appears to have been held not unlawful even for members of a trade association to agree not to extend credit to a dealer who is in arrears upon an account with any of their number. See: *U. S. v. Fur Dressers' and Fur Dyers' Assn.* U. S. District Court, S. D. New York, In Equity, No. E. 25–94. Decided May 4, 1925.

It may well be doubted, however, that this rule will ultimately prevail. It is significant that the Supreme Court in a subsequent decision, upholding a purely voluntary arrangement for providing credit information, declared: "The evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer." *Cement Manufacturers' Assn. v. U. S.*, Supreme Court, October Term, 1924, Docket No. 551. Decided June 1, 1925. Preliminary Printing, pp. 8–9.

adjudicated in the courts.[1] On principle, however, such an agreement might well be held to constitute an unlawful restraint of trade, regardless of the reasonableness of the standards set up by the association. To permit the mutual definition of what shall constitute legitimate credit-granting would tend to delimit unduly the operation of competitive forces. Buyers are as much entitled to an open market in which to bid for goods with their credit, whatever its value, as they are to an open market for their cash bids. And sellers, on the other hand, should be as free to attract patronage by means of the credit advantages they are in position to offer as through the level of their price quotations.

Agreements to withhold credit from those who fail to attain a stipulated standard, however reasonable, may be assimilated, from the standpoint of legal status, to price agreements. It might appear to be only a measure of reasonable prudence for a group of sellers to stipulate that none of the associates shall sell his products below a specified price which corresponds to the recognized minimum cost of production. Yet, while such an agreement, if honestly made and based upon indisputable facts, would not in itself be harmful, it would possess no validity under the law. The courts, as we have seen, view such arrangements in the light of their general tendencies rather than in the light of their specific characteristics. No such measure of mutual protection would be allowed to stand, because it could so readily be transformed into an engine of exploitation and a means of obstructing the development of productive efficiency. Agreements to refuse credit to those trade customers who fall

[1] In the state courts there have been several cases upon this subject. In *Brewster v. Miller's Sons Co.*, 101 Ky. 368 (1897), plaintiff sued for damages on account of refusal of defendant funeral director to inter plaintiff's wife. The defendant as member of local association of undertakers had agreed not to serve any person who had an unpaid account with any member of the association. Judgment was for the defendant, since it made no difference whether the agreement to refuse credit under specified conditions was lawful or unlawful under the anti-trust law. The mere existence of a conspiracy in restraint of trade affords no ground for action to a member of the general public, not directly injured by the unlawful combination. This principle is now generally admitted. But the court felt impelled to go beyond this position and indicate its view that the agreement to withhold credit was a lawful transaction. This was pure *obiter dicta*. In *Brewing Co. v. Belinder*, 97 Mo. App. 64 (1903), just such an agreement was adjudged to be a violation of the Missouri anti-trust law.

below fixed standards of eligibility would be likely to encounter a similar judicial attitude. No one can question the immediate advantage to sellers of the adoption and enforcement of proper limits to credit granting; and eventually the reduction in bad-debt losses might be expected to accrue to the benefit of consumers in large measure. But such an arrangement cuts substantially into the play of competitive forces. The freedom of action of both buyers and sellers, as noted above, is deliberately curtailed, and the possibility, perhaps the likelihood, of the abuse of such a privilege is manifest. Arbitrary and concerted control of the channels of distribution in the given trade might readily be achieved through the instrumentality of such a credit policy. There could be no reliable assurance that a buyer might not be discriminated against for other reasons than a failure to maintain sound credit—to conduct his business with a reasonable regard for the security of his creditors. Sellers frequently manifest a deep and active interest in other features of their patrons' business policy. The extensive litigation, in recent years, arising out of attempts to enforce resale price maintenance and to curb co-operative purchasing illustrates the character and direction of this interest. The coercion which might be exerted to marshall an entire trade "into line" by a discriminatory exercise of the power to withhold credit (from the usual sources, at least) would probably constitute a sufficient deterrent to tolerant acquiescence in the erection of such a power.

This point of view is reflected in the provisions of several equity decrees in recent trade association cases. In the cement decree the defendants were enjoined from "agreeing to refuse to make sales to particular customers and/or from agreeing upon circumstances or conditions which shall exclude customers from being extended credit."[1] The tile decree specifically forbade defendants "to formulate and establish or to retain in effect any requirements . . . or conditions non-conformity . . . with which shall exclude any customer . . . from securing credit or

[1] *U. S. v. Cement Ass'n*, U. S. District Court, S. D. New York, In Equity, No. E. 22–25, December 13, 1923. Sec. 8. While the Supreme Court has recently reversed the judgment upon which this decree rested, it plainly indicated that had there been evidence of such an agreement as the decree forbade its decision would have been different. See footnote, p. 153, *supra*.

shall impose any limitations or conditions whatsoever upon the credit granted."[1] There seems to be no reason for questioning the soundness of these decrees with respect to these particular provisions.

The concerted denial of credit opportunities to trade customers is deemed to be equally subversive of sound public policy when achieved through tacit understanding rather than express agreement. It frequently happens that without an explicit undertaking by all concerned to refuse credit to applicants ascertained to be in a financial position regarded by general consent as straitened or unsafe, there is a tacit understanding to the same effect. This is generally evidenced by the circulation of a list of delinquent or undesirable debtors. It is exceedingly difficult so to manage such a circular that it will not be subject to the construction of being a "blacklist."[2] It is conceivable, of course, that by this means a credit bureau might be merely issuing to its members credit information, as it becomes available, resulting from its normal fact-finding activities. Such information might or might not be immediately usable, and if usable, it might or might not be acted upon by the members according to the tenor of the report. Under such circumstances the practice might conceivably be carried on with no more intent or effect of concerted discrimination than would be involved in the procedure whereby the assembled information is furnished solely upon the specific request of a member concerning a particular customer.[3] Here as elsewhere, however, the law is quite as much concerned with the general tendencies of concerted action as with its concrete consequences in particular instances. Such credit circulars undoubtedly exert a distinct influence upon sellers in the direction of rendering

[1] *U. S. v. Tile Manufacturers' Credit Association*, U. S. District Court, S. D. Ohio, In Equity, No. 21, Nov. 26, 1923, sec. 5 (o).

[2] See *Kingsbury v. Bradstreet*, 116 N. Y. 211 (1889), and *Denney v. Credit Association*, 55 Wash. 331 (1909). These cases were actions for libel, and in both proceedings it was held that the inclusion of the plaintiff's name in a list purporting to direct attention to persons of questionable credit standing, but making no specific allegations with regard to his moral or financial integrity, might furnish ground for action if special damage is proven. In the federal jurisdiction, in proceedings for treble damages under the Sherman Act for obstructing the free flow of commerce, such proof of special damage is also required. See *Gibbs v. McNeeley*, 102 Fed. 594 (1900); *Jack v. Armour & Co.*, 291 Fed. 741 (1923).

[3] Cf. *Putnal v. Inman*, 80 So. 316 (Fla., 1919).

their credit policies toward the listed buyers uniformly restrictive; their usual effect is to destroy, or at least to curtail substantially, the credit privileges of these buyers in the entire market. The circulation by a trade association, therefore, of a list of dealers or customers alleged to be poor credit risks will be sharply scrutinized by the courts. In one of the recent consent decrees against trade associations the defendants were specifically enjoined from "agreeing among themselves to use a published credit list and credit information for the purpose of blacklisting an undesirable purchaser or for the purpose of putting the name of the purchaser on such list with the intent of the manufacturer who submits the name reserving the purchaser's business for himself."[1]

§4. The Establishment of Uniform Credit Terms

Closely allied to these concerted arrangements, growing out of the interchange of credit data, which are designed to withhold credit altogether under certain conditions, are agreements seeking to establish uniform credit terms. Should such agreements be deemed contrary to public policy, and if so, upon what grounds? One of the basic advantages generally urged on behalf of the competitive system is that it permits a wide range of adjustments in all details of business dealing to fit the infinitely varying circumstances of concrete situations. No other system, it is contended, provides for so free and flexible an adaptation of trade to the constantly changing conditions which characterize the world of practical affairs as the competitive organization of industry. And this adaptability is largely accomplished through the fluidity of the terms upon which trade is conducted. Concerted action designed to develop uniformity of credit terms serves to obstruct these spontaneous adjustments. It is unquestionably true, however, that the terms upon which credit is granted in well-established lines of commerce and industry tend to become definitely stereotyped, even under free and unfettered competition. There probably exists in every

[1] *U. S. v. Gypsum Industries Association*, U. S. District Court, S. D. New York, In Equity, No. E. 25–215, Jan. 3, 1923, sec. 3 (i). In the tile decree, cited above, the defendants were enjoined from agreeing "to refuse to sell to any persons or corporations because of any unpaid account or accounts." Sec. 5 (n).

trade what may be deemed a normal maturity for current credit obligations, which is based upon the nature of the productive uses of the goods transferred or upon the special characteristics of the consumptive demand. Moreover, promptness in the meeting of business obligations is in no small measure a matter of habit. As a given trade or industry reaches a stage of reasonable maturity, and the business operations thereof come to be conducted systematically and intelligently, there develops an inevitable approach to uniformity of credit terms. It may be argued, therefore, that since credit terms tend to become standardized in practice in any case, agreements to that end only shorten the period of wasteful experimentation. No substantial hardship is likely to result from conscious and deliberate standardization activity, and some gain may reasonably be anticipated in the elimination of delay and friction in the collection of claims.

While these circumstances are doubtless deserving of serious consideration, there are counter-circumstances which would probably render such trade association activity invalid. In the first place, there can be no definite assurance that the articulated wisdom of the group will evolve just the right combination of terms any more quickly, and with greater freedom from the process of trial and error, than the shrewd speculation of individual creditors. The latter is more directly stimulated by the urge of self-protection, and is sharpened by the presence of diversity of practice; the former is reassured by the prospect of competitive equality, and is dulled by the absence of contrast and comparison. But far more important than this matter of expedition in the stabilization of credit practice are the inherent limitations upon this phase of standardization activity. There are always exceptional cases which require, usually deserve, and in normal circumstances obtain, exceptional credit treatment. There are the buyers who are doing business on a narrower margin of working capital than is customary in the trade. There are those whose business turnover is slower, but perhaps surer, than that which generally prevails. There may be a thousand and one special circumstances affecting occasional transactions of even typical concerns which would

justify either more lenient or more exacting terms than usual for the settlement of a particular obligation. The financial position of sellers may likewise vary in such a way as to warrant even striking diversity in the credit terms offered by way of inducement to attract patronage.

All of these situations may be properly and readily cared for under the elastic standardization of credit terms resulting from free competition for credit business. Under the rigid standardization of credit terms by joint agreement, on the other hand, there exist no adequate means of orderly adjustment to such situations. If the demands of exceptional circumstances are met at all, and the "business rights" of all classes of trade customers measurably conserved thereby, it is by subterfuge and indirection—which interfere with the development of healthy trade relations and stable business conditions quite as effectively as the uniform regulation of credit terms could possibly foster them. Upon broad grounds of this character, therefore, the courts would probably find themselves constrained to invalidate any offshoot of credit co-operation by trade associations which is designed to standardize credit terms. Such activity impinges unduly upon the free operation of competitive forces.

Implicit throughout the foregoing discussion has been the assumption that credit and the terms upon which it is granted constitute vital considerations in all market adjustments in which they figure—that credit arrangements bear a direct relationship to price determination, and hence to the basic processes of competitive rivalry. That such an assumption is grounded in sound economic doctrine and universal business experience requires no further emphasis at this point. It may be taken as self-evident that a present dollar is worth more than a future dollar, and that credit terms exert an important influence in the attraction or repulsion of business patronage. But does this conception comport with established legal doctrine? Until recent years the courts regarded credit granting by common carriers and public utilities as a matter of grace, and as incapable of becoming a source of discrimination.[1] This view appeared to

[1] See Bruce Wyman, "Public Service Corporations," New York, 1911, sec. 435, and cases there cited.

overlook the significance of credit as an element in business adjustments. Latterly, however, the influence of hard facts has led to a revision of this doctrine.[1] It is now the decided trend of judicial authority, in the interpretation of state statutes as well as of the Act to Regulate Commerce and its amendments, to bring the exercise of the power to extend credit within the scope of the prohibitions of "unjust discriminations" and "unfair practices."[2] This change of attitude constitutes a clear recognition of the fact that the enforcement of impartiality in credit granting is as essential to the maintenance of fair and equal treatment of public utility patrons as the regulation of rates and service. And if public utility companies undertaking to extend credit are bound to grant that credit to all who apply upon like terms, it cannot well be said that agreements among commercial and industrial competitors with regard to the conditions and terms upon which they will transact their credit business is unrelated to the freedom and vigor of their competitive rivalry. No serious claim is now made that credit granting is a mere incident, a collateral and insignificant factor, in the operations of modern business. There is general agreement, both in legal doctrine and in business practice, that credit terms constitute a vital feature of all commercial transactions into which they enter.

§5. The Limits of Co-operative Activity in the Regulation of Credit

In summary, then, it appears that a trade association may lawfully organize facilities for the interchange of ledger data and all other relevant information possessed by its members with regard to the credit standing of its trade customers. The credit activities of trade associations are generally of this character, the assembled information being made avail-

[1] The authorities are reviewed and the recent developments surveyed in a note on "Credit Extension as an 'Unfair Practice' under the Interstate Commerce Act" in *University of Pennsylvania Law Review*, vol. 69, May, 1921, p. 365.

[2] See *Southern Railway Co. v. Georgia*, 137 Ga. 497 (1912); *Hocking Valley Railway Co. v. U. S.*, 210 Fed. 735 (1914); *Postal Telegraph Co. v. Western Union Telegraph Co.*, 59 I. C. C. 512 (1920); *People v. Public Service Commission*, 230 N. Y. 95 (1920); reversing Appellate Division of Supreme Court in same case, 183 N. Y. S. 659 (1920). Cf. also, *McGuire v. Atlantic Coast Line R. R. Co.*, 118 S. E. 225 (Va., 1923).

able to members only upon special request with respect to specific applicants for credit, and each of the associates formulating his credit policies independently of the group as a whole. But whenever a credit bureau so organized reaches much beyond this simple function, it tends to obstruct the free play of competitive forces and is likely to encounter legal obstacles. The prescription of a "dead line" of credit eligibility, the announcement in advance of the names of persons or firms failing to place themselves within this line, and the agreement upon uniform terms of credit are open to serious objection. While the issues involved have not been fully clarified by extensive litigation or definitively adjudicated by courts of final jurisdiction, the nature and purposes of our prevailing anti-trust policy would probably lead to the condemnation of these practices. But even with such restrictions upon business co-operation in the safeguarding of credit transactions, the primary and essential function of such co-operation remains entirely unimpaired. That function is not to eliminate competition in the transaction of credit business. It is, rather, to render competition for credit sales more enlightened and more prudent.

CHAPTER XI

NEGOTIATION OF PURCHASES

§1. The Nature and Significance of Joint Negotiation of Purchases

One of the considerations almost invariably advanced in defense of corporate consolidations is that they are enabled to realize substantial savings in the purchase of raw materials and supplies. The claim is generally made that, by buying in larger quantities than would be feasible for a single producing unit, and by being in position, accordingly, to select the choicer and more dependable sources of supply, a large combination can keep down its costs below those of its smaller rivals. These advantages are strongly urged in justification of extensive mergers, along both manufacturing and mercantile lines. Whether or not this type of reasoning provides an adequate basis for approval of vast aggregations of capital, the claim of economy is doubtless grounded in the facts of experience. While it is difficult, if not impossible, to measure the extent of these savings, it is unquestionably true that in many instances a larger volume and a more continuous stream of purchase orders will enable the particular producers of raw materials or finished goods thus favored to quote lower prices for their output. But neither speculative analysis nor actual experience indicates that corporate combination is an indispensable means to this accumulation and regularization of demand, which results in lower purchasing costs. It appears that this end may be achieved through co-operation among independent enterprises as well as through consolidations and mergers.[1] And here, as elsewhere, trade associations, being established institutions widely representative of particular branches of industry, constitute the natural medium for co-operative effort.

[1] In the absence of any arbitrary discrimination by sellers, which, in any event, is not likely to be a permanent influence.

Until very recent years collective purchasing was a form of group action largely confined to temporary organizations of farmers and consumers. The industrial structure being organically competitive in character, the principle and technique of conscious co-operation were slow to emerge. The development of concentration of production and control in the commercial and industrial field, coupled with the striking absence of permanent organization among the vast number of small-scale agricultural producers and the scattered army of general consumers, first led to intermittent efforts on the part of these latter groups to strengthen their bargaining power through co-operative action. Manufacturers and traders, on the other hand, since large-scale enterprise and the corporate organization of industry automatically yielded, in some measure, the fruits of co-operative purchasing, confined their group activities primarily to productive operations and marketing processes. Latterly, however, trade association activities have extended, in some instances, to the joint negotiation of purchases. With the growth of a strong pressure in various markets against the smaller operating units—as a result of the formation of dominant combinations in the industrial field and the emergence of federated and other far-flung types of business organization (such as chain-stores and mail-order houses) in the mercantile field—there have been evolved practical plans for the joint purchase of materials and stocks by members of trade associations. Some of these plans are essentially prudential in character, and give rise primarily to questions of expediency. Other plans are questionable in character, and frequently involve legal controversy. No inflexible rule can be laid down upon the lawfulness of this type of association activity. Its legal status is dependent upon the object pursued in each instance and the concrete effects of the arrangement upon the markets encompassed by it. Joint negotiation of purchases necessarily involves some diminution of competition on one side of the market; but it must amount to an unreasonable restraint of trade before it comes within the proscription of the anti-trust laws.

It will be recalled that up to this point trade associations have been considered primarily as groups of sellers. It is

ordinarily as such that they are organized. The range of their membership and the boundaries of their "jurisdiction" are determined, essentially, by the like relation of all the associates to a given market outlet. In most instances trade associations function as organizations of sellers. In those cases in which attention has been directed to their group action on the purchasing side, this form of activity has been exceptional and incidental. It has emerged, for example, when the collective buying power of the group was used as a weapon in boycotting a manufacturer who sold to parties obnoxious to the association. Under these circumstances, however, the legal status of the collective action is determined by the ultimate object sought to be attained rather than by the mere fact of association in the matter of purchasing. In other words, the condemnation of the law is visited upon concerted exclusion of outsiders from a given market; the utilization of joint purchasing power in effecting a boycott is simply regarded as a means toward this end. But it must be recognized that co-operation in the negotiation of purchases may be pursued as an end in itself. Those who sell a product must also buy it or its constituent materials. Do members of a trade association enjoy any greater liberty in making agreements upon where, when, how much, and at what price they will buy than in making like agreements with regard to their sales? On principle there would seem to be no basis for distinction. But in point of fact both the prosecuting authorities and the courts have manifested a far less stringent attitude towards co-operation among buyers than they have towards concert of action among sellers. Is one justified in concluding that the anti-trust laws contemplate a different standard in testing the lawfulness of the one form of associated activity than in testing the legality of the other?

§2. The Purposes of Anti-Trust Policy and the Status of Sellers' and Buyers' Combinations

Whether or not one accepts the view that the Sherman Act was but an incorporation of common law rules into the federal law, the conclusion seems inescapable that its provisions were designed primarily for the protection of con-

sumers against the artifices of over-reaching producers. The situation which led to its enactment, as well as the character of the legislative history of the statute, discloses unmistakably that the detrimental influence upon the consuming public was the basis of the prohibition of restraint of trade and monopoly. The grounds for invalidating arrangements calculated to obstruct the free operation of the competitive process are to be found in their tendency to impair the quality or enhance the price of commodities and services. And the incidence of such abuse falls predominantly upon buyers. It is true, of course, that consumers are neither the sole buyers, nor solely buyers, in modern industrial society; but the characteristic circumstance of all consumers is that, directly or indirectly, heavily or lightly, frequently or occasionally, they are buyers in the market. Accordingly, market law seems to have been directed primarily to preventing sellers from unjustly enriching themselves at the expense of buyers. Moreover, since consumers and buyers are normally scattered and unorganized, the very considerations which created the need for their protection served to minimize the necessity of protecting producers and sellers against their concerted pressure.

Under these circumstances it is not surprising that the books afford no record of an attack upon, let alone a dissolution of, a co-operative buyers' club among housewives or farmers, or a co-operative store among laborers. Although such associated activity among consumers is not uncommon, it seems to have been uniformly free from public interference. Nor do any of the frequent consumers' boycott campaigns appear to have been molested by judicial process.[1] In the period of mounting prices following the war, numerous boycotts, or so-called "buyers' strikes," were organized—the "blue jeans" movement against the men's clothing industry being one of the more spectacular. Far from being hindered, these activities were commended and even stimulated by government authorities. Yet they were unquestionably designed to reduce prices, and they sought to accomplish this by restricting

[1] There appears to be one exception to this statement. See *Council of National Defense of New Mexico v. International Magazine Co.*, 267 Fed. 390 (1920).

competition on the buying side of the market. They clearly tend to achieve results which are genuinely, if only temporarily, detrimental to the interests of the producers or sellers concerned. Like efforts in the opposite direction, at the instance of producers or sellers, would certainly not have escaped prosecution had they come to light.

§3. The Validity of Joint Purchasing Agreements

If one is warranted in concluding that the limits of lawful combination among buyers are not identical with those applicable in the case of co-operation among sellers, what, precisely, is the nature of this difference in legal attitude? There is no need of considering further the status of consumers' co-operative activities, including their boycotts. Since the subject of this study is trade associations and their activities, it is primarily concerned with co-operation among business men; so, in considering the legal status of joint negotiation of purchases, the chief interest lies in the operations of producers or sellers in the rôle of buyers. Accordingly, the inquiry will be confined to the determination, if possible, of how far business rivals associated in a common trade organization may unify their interests in buying, even if a like unification in their selling interests might transcend the sphere of lawful co-operation. Perhaps the best method of clarifying this problem will be to present concretely several situations, exemplifying joint negotiation of purchases under varying circumstances, toward which the courts appear to have taken different attitudes. If these decisions, in principle, are found not to be essentially in conflict, the process of reconciling their apparently conflicting results may provide a clue to the explanation of the considerable uncertainty which now envelops this aspect of the anti-trust laws.

The first case in the federal jurisdiction which is directly in point arose in 1909 upon simple facts presenting a clear issue.[1] The plaintiff was a firm engaged in the general merchandise brokerage business, with an office at Pine Bluff, Arkansas. It complained of its loss of trade, occasioned by the formation of the defendant corporation, the Arkansas

[1] *Arkansas Brokerage Co. v. Dunn & Powell*, 173 Fed. 899 (1909).

Brokerage Company, to do the buying directly from manufacturers and manufacturers' agents for the five principal jobbing houses in the Pine Bluff territory. The defendant, it was admitted, did substantially all of the purchasing for its five stockholder firms, and had also extended its business by taking over accounts of numerous outside jobbers. It had become the authorized representative in that territory of many manufacturers. The plaintiff firm was forced out of business, and in view of the circumstances disclosed above, brought suit for treble damages under Section seven of the Sherman Act. The court, after reviewing the facts, declared: "The contention of the plaintiff is reduced to this: That the defendant jobbers wronged the plaintiff by arranging to do for themselves what they had formerly employed it to do for them, and that the brokerage company wronged the plaintiff by availing itself of all its opportunities and favorable conditions for successful competition in a branch of business open to all comers. . . . But the organization of the brokerage company as a competitor in a business open to all had no natural tendency to directly or necessarily restrict commerce between the States, and the proof fails to show that it actually did restrain, lessen, or in any way stifle its free flow. . . . It seems clear that the Pine Bluff jobbers merely resorted to a common expedient, recognized by law and sanctioned by practice, of forming a subsidiary corporation to promote economy in the management of their existing business, and to extend it into other fields of legitimate enterprise."[1] . . . It may be added that the consolidated purchases of the Arkansas Brokerage Company were obviously of small moment in the selling market of the manufacturers. Moreover, so far as appeared from the record, the defendant jobbers remained in active competition for trade in their own selling market, not alone among themselves, but also with outside "regional" jobbers. In the mere fact of combination for negotiating purchases, therefore, there was held to be no violation of the anti-trust law.

This appears to be the only case in which a joint purchasing agreement among competitors has been directly challenged and affirmatively upheld. But recently, in several

[1] *Ibid.*, pp. 900, 903.

instances, the power of the courts has been enlisted collaterally in the protection of such agreements. In 1922, for example, the Southern Hardward Jobbers' Association was ordered by the Federal Trade Commission "to cease and desist" from practices calculated to prevent a retailers' common buying agency, known as the Merchants' Co-operative Association, from procuring at wholesalers' prices the hardware stocks required by its members.[1] The Merchants' Co-operative Association was an organization of "certain retail dealers in hardware in Georgia and adjacent states . . . for the purpose of purchasing in wholesale quantities, through the instrumentality of that corporation, all hardware and supplies dealt in by such retail dealers." The complaint was directed particularly against the practice of the respondent of warning and influencing hardware manufacturers not to sell to this retailers' purchasing combination. A petition to review the order of the Commission was denied by the Circuit Court of Appeals.[2] Whether or not it would have constituted an adequate defense, had it been set up and proved, it is noteworthy that the respondent made no attempt, so far as the record discloses, to establish that the Merchants' Co-operative Association was itself a combination in restraint of trade. Moreover, the Federal Trade Commission does not appear to have regarded its proceedings in this case as exceptional. Indeed, it was but pursuing a policy previously enforced. Three years earlier the Commission had made complaint under substantially similar circumstances against members of the California Wholesale Grocers' Association and certain manufacturers co-operating with them.[3] In that case, too, no question was raised, either before the Commission or before the Circuit Court of Appeals upon petition to review the Commission's order, concerning the lawful status of the Los Angeles Grocery Company, against which the alleged

[1] *Federal Trade Commission v. Southern Hardware Jobbers' Association*, 4 F. T. C. Dec. 428 (1922).

[2] *Southern Hardware Jobbers' Association v. Federal Trade Commission*, 290 Fed. 773 (1923).

[3] *Federal Trade Commission v. Western Sugar Refining Co.*, 2 F. T. C. Dec. 151 (1919).

discrimination had been directed.[1] Yet the Los Angeles Grocery Company was an agency established by 88 retail grocers in and about that city for the purchase direct from manufacturers of their collective requirements. The exercise of such joint purchasing power was regarded as a normal and legitimate manifestation of business expediency.[2]

On the other hand, in an earlier case, an agreement among three groups of milk dealers in eastern Massachusetts respecting the prices they would pay in purchasing fresh milk at country points was held to constitute sufficient ground for indictment as a violation of the Sherman Act.[3] It appeared that for six years prior to the finding of the indictment in 1911, the six individual defendants, as the managers of three groups of business properties, had established semi-annually the maximum price which they would bid for milk to farmers in the several New England States tributary to the Boston market. These three distributing agencies normally purchased 86 per cent of all the fresh milk shipped to and sold in Boston and vicinity. The court characterized these facts as follows: "Here is a well-defined and extensive industry consisting on the one side of producing milk and selling it, and on the other side of buying it and shipping it to Boston and vicinity. . . . Eighty-six per cent of the buying side of this industry was in the hands of these defendants. For them to agree upon prices which they would pay, and thereby to eliminate practically all competition as to price among buyers, may be found to have so seriously affected the conditions under which all persons engaged in that industry did business as to be an unreasonable restraint of trade. It is true that the milk produced might have been sold through other channels; but it is also true, as a matter of common knowledge, that it takes time to divert business from one channel to another. The sellers ought not to be compelled

[1] *Western Sugar Refinery Co. v. Federal Trade Commission*, 275 Fed. 725 (1921).

[2] This attitude is perhaps nowhere more clearly brought out than in the recent attempt of the Commission to facilitate joint purchase by compelling the National Biscuit Company to give its established discounts for quantity purchases to small retail grocers pooling their orders. The Circuit Court refused to sanction the Commission's order in this case (*National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733 (1924), and was upheld by the Supreme Court which on October 20, 1924, declined to review the decision of the lower court. Advance Opinions, 69 L. Ed. 38.

[3] *U. S. v. Whiting*, 212 Fed. 466 (1914).

either to find other outlets for their product, or to await the re-establishment of competition among buyers, being obliged meanwhile to sell their output at prices affected, if not established, by the combination of buyers, and in the making of which competition had been practically eliminated."[1]

In conformity with the judicial attitude exhibited in the milk case are the judgments in two recent proceedings growing out of a single set of facts.[2] The leading manufacturers of fresh water pearl buttons, it was charged, had formed a conspiracy to control the entire industry in all its stages. Among the several means adopted, as charged by the government in its petition, were the formation of "an association which received and distributed detailed trade information," the acquisition by contract of the exclusive right to manufacture pearl buttons on machines incorporating the Barry patent, and the unification of their purchases through the utilization of a single purchasing agency under a common control. Since the latter arrangement constituted but one element in the conspiracy to monopolize alleged by the government, the adverse decree in this criminal suit is of less weight for the purposes of our present inquiry than the ruling in the civil action which followed it. In this case the judgment of the court rested directly upon the legality of the transaction through which the manufacturers sought to eliminate competition among themselves in securing their necessary supplies of mussel shells. They were suing upon the indemnity bond of the manager of the corporation which they had taken over to serve as their exclusive purchasing agency, that official having absconded with certain funds not his own. The defendant insurance company was held to be relieved from liability on its indemnity obligation, upon the ground that to enforce the bond would amount to lending judicial process in aid of the execution of an unlawful agreement. It appeared that not only were mussel shells the principal raw material of these manufacturers, but that

[1] *Ibid.*, p. 477. In October, 1923, one defendant paid a fine of $500, and the cases were filed as to the other defendants.

[2] *Birrell v. Fidelity & Casualty Co.*, 188 N. W. 26 (1922); *U. S. v. Button Export & Trading Corporation*, Petition filed in U. S. District Court, S. D. Iowa, June 28, 1918, and an uncontested decree entered on same date. See List of Cases Instituted by the United States under the Federal Anti-Trust Laws, Department of Justice, Washington, December 15, 1923, p. 126.

these manufacturers represented practically the sole source of demand for mussel shells. Since the producers of these shells were scattered diggers, usually operating individually, the plaintiff corporation, representing the consolidated purchasing power of the button manufacturers, was enabled to dictate the prices to be paid in the shell market.

Two very recent complaints of the Federal Trade Commission lend further support to the doctrines enunciated in the foregoing cases. In January, 1924, five manufacturers of iron and steel products on the Pacific Coast were cited before the Commission for entering into a "combination to suppress competition in the purchase of raw materials used in their plants." In carrying out this alleged conspiracy, it was charged that they had mutually agreed to confine their purchases of scrap iron and steel, which appeared to constitute their chief raw material, to a corporation, known as the Steel Mill and Foundry Supply Company, organized and controlled by them jointly. Since the respondents were practically the only users of such "scrap" on the Pacific Coast, and since it is not practicable to ship material of such weight and value over the mountains, it was alleged that these associated manufacturers were enabled to purchase their raw material "at far below the fair market value by forcing those who had ('scrap') for sale to deal through the Supply Company."[1] Along similar lines is the complaint filed in February, 1924, against the Boston Automobile Dealers' Association, Inc., charging that its members had "combined together to agree upon and fix uniform and maximum allowances and valuations for used automobiles taken by them in trade."[2]

§4. Essential Factors in the Condemnation of Cooperative Purchasing Arrangements

It appears to be established, therefore, in so far as a legal issue may be deemed to be settled prior to its determination by the Supreme Court, that not under all circumstances is a combination among buyers to regulate or negotiate their

[1] Complaint No. 1103. Advance Sheets, F. T. C., Jan. 12, 1924. Dismissal announced, April 5, 1925, no reasons being assigned.

[2] Complaint No. 1120. Advance Sheets, F. T. C., Feb. 27, 1924. Dismissal announced, May 9, 1925, no interstate commerce being shown.

aggregate purchases beyond the reach of the anti-trust laws. But it is apparent, also, that some arrangements of this character are clearly within the law. What are the basic grounds of distinction? A careful consideration of the various cases which on their face seem to be in opposition upon the question of the legal status of joint negotiation or concerted action in the matter of purchases appears to reveal a clear line of differentiation.

In every case, for example, in which the Federal Trade Commission has exerted its regulatory powers in defense of combinations among normally competitive buyers, it will be observed that the combination, although covering a considerable territory and including numerous independent dealers, represented an inconsiderable fraction of the aggregate purchasing power flowing into the raw material or finished stock markets from which the purchases were made. In other words, the market outlets for the class or classes of goods bought were not appreciably obstructed. The sellers of these goods still negotiated their sales in a competitive buying market. In the Los Angeles Grocery Company case, for instance, it was established that there were several local chain store systems operating in Los Angeles and vicinity the individual purchases of which exceeded the aggregate purchases of the 88 independent retailers making up the "buying exchange." A similar relationship also exists, of course, in the case of farmers' clubs buying fertilizers and like supplies by the carload or in gross. They generally represent no more than an insignificant fraction of the total number of users and dealers making purchases in any given market. And it may be noted that this is normally the case, also, with respect to the purchase of raw materials by manufacturers. No single industry represents the sole outlet for most types of raw material. The situation may be very readily illustrated. If even all the manufacturers of glucose, starch, bakers' sugar, and corn syrup, making up the wet-milling industry, were to pool their purchases of corn, or agree upon the price they would bid for corn, the effect of the arrangement upon the market price of corn would probably be almost negligible. Since the normal consumption of corn in this industry is not in excess of five per cent of the annual

crop, the price of corn would still be competitively determined. There would be little likelihood of resulting hardship upon farmers or legitimate dealers in corn, and there would emerge at least a possibility that any savings which might be effected through a more judicious purchasing policy or a more efficient system of storage and distribution would inure in part to the benefit of the consumers of refined corn products. Similarly, in the case of the establishment of a joint purchasing agency by competing stove manufacturers, no ill would be likely to result therefrom to iron and steel manufacturers, and some measure of economy might reach the ultimate consumer. Under such circumstances, then, trade co-operation in the purchase of materials and supplies appears to be free from the likelihood of legal interference.

But when, on the other hand, the associated purchasers tend to dominate the given buying market, the concert of action becomes subject to the prohibitions of the anti-trust laws. In the milk and the pearl button cases, as well as in the scrap iron proceeding, for example, the buyers who combined upon a unified purchasing policy represented the predominant if not the sole market outlet for the raw materials and supplies involved. When those in control of a substantial portion of the purchasing power directed toward any particular material or supplies market eliminate competitive bidding for such material or supplies, the sellers thereof are deprived of the advantages of that free course of trade which it is the purpose of the anti-trust laws to protect. That these sellers may shift to other lines of production if they find the price of their goods unremunerative, facilitating thereby a decrease in supply and an increase in price, does not provide an adequate justification of the practice. No one has seriously urged in defense of a selling monopoly the parallel truth that buyers of monopolized goods are free to shift to other lines of consumption, tending thereby to reduce the demand and depress the price. These possibilities merely impose limitations upon the arbitrary exercise of monopoly power; they do not detract from the reality of the existence of such monopoly power. It may be concluded, therefore, that the joint negotiation or regulation of purchases by members of a trade association who represent

a predominant section of the demand for a given product in a given market will be held by the courts to amount to an unreasonable restraint of trade.[1] Just what percentage of demand control will be deemed to amount to such an undue interference with the competitive process cannot be determined in advance, just as no inflexible rule can be laid down as to the extent of the domination of supply which will be construed to constitute an unreasonable restraint of trade. In either case the legitimacy of the associated action must ultimately depend upon the judicial interpretation of the nature of the special circumstances surrounding each combination.[2]

An attendant circumstance which may be found to have an important bearing upon the legal status of purchasing agreements is the position of the associated buyers in the market in which their product is sold. If they represent the sole or even the principal sellers of the ultimate product in some market, that fact in itself may reflect upon the legitimacy of the aggregation or unification of their purchases. Such conditions are favorable to the extension of their co-operation to the selling side of the market, and therefore to definite and direct restraints of trade. In the Los Angeles grocery case and in the Southern hardware case there was ample evidence that the retailers who co-operated in buying did not hold a dominant position in retail selling in any section of the market. This situation doubtless contributed to the readiness with which the Federal Trade Commission accorded protection to the joint purchasing arrangements involved

[1] Either the absence of this essential condition, or the failure to allege it, appears to have been the factor which led the court to sustain demurrers to an indictment of the J. Reardon & Sons Co. and the Consolidated Rendering Co., returned Feb. 22, 1910, in the United States Circuit Court for the District of Mass. All that the indictment charged was that the two defendants had ceased after a certain date to compete with one another in the purchase of their raw materials in specified markets. On June 23, 1910, the demurrers were sustained, the indictment was adjudged insufficient, and the respondents were discharged.

[2] The distinction which has here been drawn between lawful and unlawful agreements for joint purchasing of materials or supplies under trade association auspices does not appear to conform to the views of the Department of Justice. In the consent decree against the tile manufacturers there is a blanket prohibition of joint purchasing. In section 5 (q) of the decree the defendants are specifically ordered not "To establish any system of co-operative purchasing of raw materials or supplies or of co-operative owning of the sources of raw materials, which shall eliminate or tend to eliminate competition in the purchasing of said materials or supplies."

in these proceedings. In the Massachusetts milk case, on the other hand, the defendants controlled a predominant part of the business of selling milk in Boston and vicinity. And while there was no allegation that their sales were non-competitive, the mere fact of this dominating control among the defendants as sellers may well have served to strengthen the judgment of the court in upholding the indictment. It should be noted, however, that aside from the question of jurisdiction, if a group actually combines to suppress competition in the sale of a given commodity, it becomes at the most but a matter of aggravation that the associates have also exercised their collective power to prey upon the sellers of essential raw materials or intermediate products.[1] In both the Swift case[2] and the American Tobacco case,[3] for example, restraint of trade and monopoly were involved in selling operations as well as in buying operations. The decisions rest primarily upon the illegality of the control of the markets in which their ultimate products were sold, or at the least, upon the comprehensive schemes disclosed to dominate the packing industry and the tobacco industry, respectively, as organic wholes. Such decisions, therefore, do not determine the principles governing pure buyers' agreements.

It may be noted, also, that the circumstance of whether the concerted buying operations relate to domestic markets or to foreign markets may have a bearing upon their legal status. Notwithstanding the wording of the Sherman Act, which makes no distinction between the prohibitions applicable to interstate commerce and those applicable to foreign commerce, no one familiar with the long line of cases

[1] See *U. S. v. Sumatra Purchasing Corporation*, indictment filed in U. S. District Court, S. D. New York, Oct. 7, 1918, and consent decree in Equity No. 17–317 entered April 13, 1920. This case is peculiarly significant because the consolidated buying power was directed exclusively to foreign purchases for importation. In the absence of a clear attempt to monopolize the sale of Sumatra tobacco in the United States, extending even to a division of territory with foreign trading companies, it is an interesting speculation whether or not the joint purchasing would have been attacked. See, also, *U. S. v. M. Pioway & Sons*, 251 Fed. 375 (1917). The defendants were members of the National Onion Association, and were charged with a conspiracy to regulate the supply of onions, and hence to control the price, through buying up the greater part of the crop during and shortly after the harvesting season. The petition of the government was not sustained.

[2] *Swift & Co. v. U. S.*, 196 U. S. 375 (1905).

[3] *U. S. v. American Tobacco Co.*, 221 U. S. 106 (1911).

touching upon the regulation of these two branches of trade over which the Federal Government has jurisdiction will question that the courts, upon occasion, might find grounds for discriminating in the rigor of the application of such a statute between the two spheres.[1] Indeed, in at least one industry joint purchasing contracts, embracing substantial sections of the trade, have been openly negotiated with the foreign producers of an essential raw material for a number of years.[2] The Federal Trade Commission has taken official cognizance of this practice. But no adverse action has ever been taken by the government to hinder the execution of these contracts, the Department of Justice doubtless appreciating that such action would be as impolitic as it would probably be futile. And it is perhaps indicative of the prevailing attitude toward such arrangements that there has recently been introduced in Congress, with the approval of the Secretary of Commerce, a bill expressly legalizing combinations of domestic manufacturers and importers for the purpose of effecting purchases jointly in foreign markets.[3]

Finally, attention may be called to the fact that when a trade association representing a dominant portion of the participants in an industry on the buying side acts in collusion with an illegal combination of those selling supplies in that industry, the association thereby becomes a means to the violation of the law and is deemed as culpable as any other party to the monopolistic conspiracy. In a recent

[1] Cf. E. P. Prentice, "The Federal Power over Carriers and Corporations," New York, 1907, pp. 48–51; F. N. Judson, "The Law of Interstate Commerce," Chicago, 1916, pp. 6–7, 70–71; M. W. Watkins, "Federal Incorporation," 17 *Michigan Law Review*, 80–85. The opinion in *Brolan v. U. S.*, 236 U. S. 216 (1915), expressly negatives the assumption of an identity between the power of Congress over foreign commerce and its power over interstate commerce, but without clearly defining the nature and extent of the difference.

[2] The manufacturers of agricultural fertilizers have acted together in securing their supplies of potash from France and Germany. Report on the Fertilizer Industry, Federal Trade Commission, Washington, 1916, p. 116; in a subsequent report on the same industry more recent contracts of the same nature are described, Washington, 1923, p. 30.

[3] S. 2843, introduced by Senator Arthur Capper of Kansas on March 15, 1924. In a letter to Senator Capper dated March 6, 1924, Secretary Hoover endorsed the principle of this bill. He pointed out "that foreign monopolies or combinations are potentially or actually in control of prices and distribution" of the following commodities: sisal for binding twine, nitrate and iodine, potash, crude rubber and gutta percha, quinine, tin, mercury, coffee, quebracho for tanning purposes. The adverse influence of this situation upon the farmer and the general consuming public was emphasized.

complaint by the Federal Trade Commission against the Eastman Kodak Company and others, for an alleged illegal monopolization of the motion picture film industry, the Allied Laboratories Association, Inc., is joined as one of the defendants.[1] It appears that this trade association, whose membership comprises the principal printers from the original negatives of the positive films sold or leased to exhibitors, had an agreement with the Eastman Company to confine the purchases of film stock by its members to that company. In return for their undertaking the members of the Laboratories Association were assured of freedom from the competition of the Eastman Company in their branch of the industry. Without prejudging the issues in this particular case, in which patent monopolies are involved, it may be submitted that, in general, any agreement whereby the members of a trade association "purchase themselves free" of competition in exchange for their collective patronage is unlawful under the anti-trust acts. Such agreements tend inevitably to obstruct the free course of trade. On similar grounds it may well be held equally unlawful for a trade association to use its collective purchasing power as a weapon to compel manufacturers and dealers on the opposite side of their buying markets to grant terms which are deemed contrary to public policy. In two recent complaints filed by the Federal Trade Commission, for example, wholesale grocers' associations were charged with coercing manufacturers to guarantee the members of these associations against price declines,[2] and orders "to cease and desist" have been entered.

It is submitted, by way of conclusion, that while an examination of the moving forces which have influenced the development of anti-trust legislation and a cursory survey of the course of adjudication of controversies involving restraint of trade or monopoly might lead to the impression that public policy is opposed to combinations among pro-

[1] *Federal Trade Commission v. Eastman Kodak Co. et al.*, Complaint No. 977, filed April 19, 1923. Preliminary Release, April 21, 1924.

[2] *Federal Trade Commission v. St. Louis Wholesale Grocers' Association*, Complaint No. 893, filed June 13, 1922; *Federal Trade Commission v. Wisconsin Wholesale Grocers' Association*, Complaint No. 894, filed June 13, 1922. See Federal Trade Commission, Annual Report for Fiscal Year Ended June 30, 1923, p. 179. Decisions have been announced in daily releases to newspapers.

ducers or sellers but is indifferent to combinations among consumers or buyers, such an interpretation of the attitude of the law would be unwarranted. It appears that the economic facts, and not the legal rules, are what have occasioned the enormously greater emphasis of the government upon the frustration of attempts to control the market on the selling side than upon the prevention of like activities on the buying side. Not only do the buyers of goods normally outnumber the sellers under modern economic conditions, but what is far more important, the buyers generally have numerous and diversified interests, rendering market co-operation among them exceedingly difficult, whereas the sellers in any given market are ordinarily a much more homogeneous group. On the selling side of most markets there is usually a well-defined species of dealers; on the buying side, in most instances, there is a conglomerate mass of more or less distinct units. The purely practical obstacles to effective concert of action are manifestly much greater among buyers than among sellers. And bearing in mind that combination *per se* is not unlawful in any part of the market—only such combination as unreasonably restrains trade being condemned—one can readily understand the disproportion in the number of instances in which the courts have been called upon to intervene on these opposite sides of the market for the protection of the public interest in the maintenance of the free course of trade. If the analysis presented in the preceding pages is sound, it appears that the field of opportunity for joint purchasing activities is neither unlimited under the law, nor so constricted as to amount to a grave handicap upon this type of trade co-operation among independent business units.

CHAPTER XII

STANDARDIZATION OF PRODUCTS

§1. The Competitive Process and the Standardization of Goods

Economists have pointed out repeatedly that, from the social standpoint, the major problem of industrial organization and control is to achieve a proper and flexible allocation of the resources of society as between different uses and undertakings—to mould effectively the character and direction of economic activity. A recognition of the significance and inherent difficulties of this central task is implicit in the widespread support which is accorded to the competitive organization of industry both in legal doctrine and in business opinion; for the competitive process, operating through the influence of freely determined prices, is assumed, in the long run, to produce an automatic adjustment of supply and demand in such a way as to reflect the real needs or desires of the community. The play of competitive forces, guided and facilitated by the price mechanism, is primarily relied upon to direct the flow of economic goods and services —to determine not only the range of distinctive types of commodities, but the numerous varieties of each type, as reflected in differences in size, style, quality, and the like. In the words of a recent survey of the underlying principles of industrial control:

> "When we take a first glance at modern industry with a view to discovering the method of its government, the first fact which strikes us would be startling, if it were not so familiar. It is that the most obvious economic problem which confronts the inhabitants of any country or of the world as a whole does not appear to be submitted to any deliberate or conscious decision at all. That problem is to determine how the limited natural resources of the community, its limited flow of savings, its limited equipment of human brains and hands is to be allocated between the infinity of different uses in which they are capable of yielding a

> harvest of enjoyment. In the main this momentous decision is left to the operation of what are somewhat vaguely termed natural forces, acting through the desires and activities of disconnected individuals. The final arbiter is the scattered army of consumers whose freely expressed preferences and aversions attract and repel the community's resources in this direction and in that. The immediate agent is the more compact but still very heterogeneous company of the leaders of business, who severally decide what shall be produced and in what quantities, in accordance with the evidence that reaches them of the desires of consumers. . . . Value or Price stands at the center of this system, acting as finger-post or danger-signal to consumers and producers, and exercising a sway more absolute than that of an oriental emperor or Russian Commissary. . . ."[1]

Under the modern factory system of production, with its large-scale enterprise and minute subdivision of tasks, there is a progressively increasing resort to standardization of processes and of products in the satisfaction of economic wants. The basic advantages of the division of labor—the best utilization and development of human capacities and the continuous employment of men and machines in the performance of specialized tasks—can be fully realized only when industrial operations are rendered as uniform as possible. This means standardization of processes. But such standardization of industrial technique necessarily involves large-scale operations, mass production, the fabrication of vast quantities of indistinguishable goods. This means standardization of products. It is to be noted, however, that these developments are confined almost entirely within the limits of the ind vidual establishment. From the technical standpoint, and in the absence of combination, the tendency to standardization does not reach beyond the bounds of the several producing organizations. Moreover, these individual producing organizations are not sufficiently extensive to cover the entire industry, because the factors of space, as reflected in transportation costs, and of executive capacity, as reflected in overhead costs, impose definite limits upon the concentration of production. It appears, therefore, that while the spontaneous tendency to standardization constitutes a distinctive and widely recognized

[1] D. H. Robertson, "The Control of Industry," New York, 1923, p. 4.

characteristic of the capitalistic system of production, there are counteracting influences which, from a purely economic standpoint, tend to obstruct the full attainment of the benefits to be derived from the principle of standardization.[1]

Moreover, even within the bounds of the machine process there is room for almost unlimited diversity of goods; the modern growth of population and extension of markets create a demand sufficient to absorb immense outputs of great variety. Such diversity of products is manifestly desirable, in so far as it reflects the real and reasonable desires of the consuming public. If the primary purpose of economic life is to satisfy human wants, the provision, under the prevailing system of private enterprise, of every type of commodity or service for which there is effective demand constitutes an essential criterion of the fulfillment of the proper functions of the industrial structure.[2] But inasmuch as under the competitive organization of industry initiative in production is distributed among a "heterogeneous company" of unco-ordinated producers, and since, too, productive activity must generally proceed on the basis of an inadequate index of the character of demand and must frequently anticipate the nature of the demand altogether, a vast flow of unstandardized products tend to emerge which do not appear to serve any significant economic purpose. It is this situation which has led to co-operative efforts, through

[1] It should not be overlooked that there is a large body of opinion which considers the marked tendency toward standardization in modern economic life socially undesirable. Standardization of processes is said to transform the laborer into a veritable machine. Standardization of products is said to destroy the individuality of the consumer. These are, however, questions of social theory, and we are here concerned only with the narrower economic considerations of producing and marketing efficiency.

[2] Some doubt has been expressed as to whether, under the prevailing system of private enterprise, the effective demand in the market represents truly the relative desires of consumers, deliberately formulated upon the basis of genuine needs. Indeed, it is frequently contended that demand is quite as much a derivative of supply and salesmanship as it is a guide to the productive activity of society. It is said that the institutional character of the valuation process precludes effective expression of rationalized individual judgments in the market. See C. H. Cooley, "Social Process," New York, 1920, pp. 293–308. But whatever the influences which affect demand directly or indirectly, the consumer is necessarily consulted in determining the character and direction of productive effort; and, for good or ill, his foibles and inconstant attachments must be heeded, no less than his more stable and uniform needs.

trade associations, designed to achieve greater standardization and simplification of products.

The unregulated unfolding of the competitive economic process tends to evolve a wasteful multiplicity of goods which serve essentially the same purpose. On surveying the fruits of current industrial activity, one is struck by a plethora of grades, styles, designs, sizes, measurements, shapes, colors, and so forth, both of consumers' goods and of semi-finished products, whose usefulness or capacity to yield satisfaction is in no way dependent upon these distinctive characteristics. Every producer, left free to gauge the unpredictable wants of consumers, is strongly tempted to try to meet or create a demand for a product which is in some respect or other, however negligible, unique. He thereby assures himself, at least temporarily, of an exclusive control of supply, with all the pecuniary advantage that flows therefrom. From the standpoint of the general public, however, this procedure involves economic waste, and therefore tends to sacrifice volume of output to meretricious variety in the provisionment of its wants. The economies derivable from a decreased emphasis on such variety are not confined to those that spring from greater efficiency in factory operations, through more advanced specialization of functions in production technique and greater opportunity for supplanting hand work by machine "labor." They extend as well, and as fully perhaps, to marketing operations, through a reduction in the enormous overhead costs of carrying huge stocks of goods from many of the sundry varieties of which sales are relatively infrequent, and of providing an extensive clerical service and advertising program for explaining to confused buyers their subtle and often insignificant differences. The burden of this chaotic heterogeneity of products is ultimately borne by consumers. It should be noted, however, that this condition is not altogether due to the producers alone. In large measure the situation is an outcome of the too human nature of the consumers themselves. It is their whims, their prejudices, their fickle tastes, above all their individualism, which account in largest part for the "wastes" to which attention has been directed.

Accordingly, any far-reaching program of deliberate standardization might operate to thwart the genuine, if "irrational," desires of consumers. Co-operative effort must proceed cautiously in this matter if freedom is not to be unduly subordinated to authority. But there is no reason for permitting these spontaneous adjustments to go to unfettered and arbitrary extremes, particularly where producers, rather than consumers, are primarily responsible for the wasteful and somewhat chaotic condition. In so far as foresight and organization can forestall the more flagrant developments of this tendency to cater to, and more frequently to create, an idiosyncratic demand, common sense should approve the effort, and considerations of economy should provide a valid sanction for it. Some degree of standardization, of course, is absolutely indispensable under modern social and economic conditions. In some matters, such as currency and weights and measurements, standardization is so obviously essential to the general welfare that the state interposes its authority to compel adherence to legally established standards. In other matters tradition and common usage have established in practice, on the basis of clear and undisputed advantage to all concerned, a certain uniformity of grades, styles, sizes, and measurements. The desirability of a standard railroad gauge is too patent to require argument. But practical uniformity has been achieved, also, in other less compelling directions. For example, it has come about that substantially all road wagons are of either a 56-inch gauge or a 60-inch gauge. In recent years, instead of leaving such developments to the slow and uncertain action of blind chance, through the unco-ordinated fumbling of individual manufacturers, they have been stimulated by the concerted action of trade associations.

§2. The Legal Validity of Co-operative Standardization Activities

That in large measure the activities of trade associations in this field have been undertaken at the instance of governmental departments and have been pushed forward by their co-operation would seem to preclude any question as to

their legality.[1] Furthermore, the absence of controversies before the courts involving such activities, and even of special investigations of them by the Federal Trade Commission, notwithstanding the close scrutiny applied to association activities generally in recent years, would appear to confirm the impression that they are not subject to attack.[2]

But any activity which regulates competition between the association members is capable of being abused. The work of standardization and simplification of products certainly imposes restrictions upon competition. The competitive process may work itself out through comparison of styles, sizes, qualities, and like characteristics, as well as through price comparisons. Normally every manufacturer or trader is free to evolve his own grades and styles and sizes, to call

[1] "Trade Association Activities," Department of Commerce, Washington, 1923, ch. IV. For example, the standardization program in the lumber industry is being carried through with the co-operation of the Department of Commerce. Secretary Hoover, in his address on "Some Phases of the Government in Business," delivered at the annual meeting of the United States Chamber of Commerce, in Cleveland, May 8, 1924, described in the following words some of the concrete problems involved in standardization activity and the nature of the co-operative efforts pursued in their solution: "The Department of Commerce has, at the request of the lumber industry, held a number of conferences to discuss the rules of the road in that industry and its relations to other industries and the common good. The problem was to establish more general and more constructive standards of practice, ethics, and waste elimination. In the toil of formulating these standards there arose a question of how thick a one-inch board should be. It sounds easy. But it quickly developed to be a question whether it should be one inch thick when it was green; after it was dried; when planed on one side, or when planed on both sides. It developed not only that a choice had to be made among these four alternatives, but also that this choice had to be based upon a proper consideration for the conservation of our forests on one hand, and the provision of a material of such structural character as to constitute a square deal to the consumer on the other. It also developed that there were 32 different thicknesses of a one-inch board in current use and that some minority of manufacturers in the drive of unfair competition were gradually thinning the board until it threatened to become paper. There also had to be developed the exact differences which threw a board into four or five different grades, and there had to be a determination of standard trade names for different species of wood. The point was that an accurate standard had to be determined before discrimination as to fair dealing and public service could be gauged . . . these conferences established some 80 questions involving the whole technology of lumber and comprising for the first time a definite series of national standards. . . The second part of the practical problem is enforcement. Again associational activities were called upon. . . Joint inspection bureaus have been erected where complaint for violation can be lodged and determination made. . ."

[2] See, however, the report of the Federal Trade Commission upon "Causes of the High Prices of Farm Implements," Washington, 1920, pp. 308–309, 350–354, in which incidental reference is made to standardization practice. The Commission remarked: "While standardization and elimination do not of themselves involve any questionable legal issue, the necessity for standard specifications in order that costs and prices may be compared is apparent."

them what he chooses, and generally to adjust himself to what he conceives to be the whims or prejudices or desires of consumers. Standardization cuts into this process. Producers and distributors, by voluntary agreement, forego their privilege of shaping or adjusting certain special features of their output according to their own judgment of what will attract the demand. They mutually limit the points of competitive appeal. In the Portland cement industry, for example, the adoption of a standard specification for cement appears to have resulted in a product of substantially uniform quality.[1] This confines the rivalry among producers in their appeal for the consumer demand to the matter of service and to the question of price. Whether such an outcome in any particular instance promotes competition or tends to restrict it unduly, depends largely upon the peculiar characteristics of the industry. This is but another way of saying that trade association work in promoting standardization is subject in law to the rule of reason. Where service and price tend themselves to become standardized, the maintenance of quality competition assumes controlling significance. Moreover, the adoption of uniform specifications and the establishment of uniform qualities tend to facilitate concert of action in price determination. In general, however, the regulation of competition which springs from standardization activities is calculated to promote the public interest. Standardization of products, by eliminating unnecessary grades and over-refinement in styles, serves to effect savings in manufacturing and marketing costs, to enhance the ease with which goods are duplicated and distributed, and to safeguard the consumer against uncertainty with regard to the quality of his purchases.

A careful survey of recent cases involving trade associations, and especially of those uncontested proceedings in which the Government has procured the broadest types of decrees by consent, discloses no instance in which standardization efforts

[1] F. W. Kelley, "The Voluntary Setting-Up of Quality Standards in Commodity Production," published by the Portland Cement Association, Chicago, 1923. The standard specification and tests for Portland cement are the result of several years' work of a special committee representing a United States Government Departmental Committee, the Board of Direction of the American Society of Civil Engineers, and Committee C-1 on Cement of the American Society for Testing Materials. Specifications were first adopted in 1904 and revised in 1908, 1909, 1916 and 1921.

have been enjoined. Indeed, after dissolving the defendant associations, some of these decrees, in setting out specifically the activities which any similar organizations may properly pursue in future, appear to recognize the right to foster standardizations of products.[1] It is certainly doubtful, however, whether standardization may be carried to any length which association members may choose without danger of encountering the prohibitions of the anti-trust laws.[2] For example, the arbitrary elimination of cheaper grades, because they are less profitable than higher grade products or because they interfere with the sale of goods the production of which is rendered exceptionally remunerative by patents or a skilled labor monopoly or some other supply-curtailing factor, would seem hard to justify under the rule of reason. Similarly, agreements not to market "seconds," which are sometimes made in certain industries, may eventually be brought under attack. The adoption of such agreements is termed "simplification" in the recent study of trade association activities

[1] *U. S. v. Gypsum Industries Association*, U. S. District Court, S. D. New York, In Equity, No. E. 25–215, Jan. 4, 1923, parag. (2) (b), p. 4; *U. S. v. Tile Manufacturers' Credit Association*, U. S. District Court, S. D. Ohio, In Equity, No. 201, Nov. 26, 1923, parag. (4) (b), p. 5. While no express reference is made to standardization activities, the language of the decrees appears to be broad enough to include them. Associations to be formed are permitted, respectively, "to deal with engineering and trade problems pertinent to the industry for the purpose of advancing the use of Gypsum products," and "to deal with engineering and trade problems for the purpose of advancing the manufacture and use of tiles. . ."

[2] The legality of trade association activities is largely determined by an examination of their purposes and effects in the particular circumstances under consideration. This is emphasized in the correspondence of February, 1922, between the Department of Commerce and the Department of Justice. Secretary Hoover inquired: "May a trade association, in co-operation with its members, advocate and provide for the standardization of quality and grades of product of such members, to the end that the buying public may know what it is to receive when a particular grade or quality is specified; and may such association, after standardizing quality and grade, provide standard form of contract for the purpose of correctly designating the standards of quality and grades of product; and may it standardize technical and scientific terms, its processes in production, and its machinery; and may the association co-operate with its members in determining means for the elimination of wasteful processes in production and distribution and for the raising of ethical standards in trade for the prevention of dishonest practices?" To which Attorney-General Daugherty replied: "I can now see nothing illegal in the exercise of [these activities] provided always that whatever is done is not used as a scheme or device to curtail production or enhance prices, and does not have the effect of suppressing competition. It is impossible to determine in advance just what the effect of a plan when put into actual operation may be. This is especially true with reference to trade associations whose members are vitally interested in advancing or, as they term it, stabilizing prices, and who through the medium of the associations are brought into personal contact with each other."

made under the aegis of the Department of Commerce; in final analysis, of course, it is but a special aspect of the process of standardization.[1]

§3. Association Trade-marks and Standardization of Price

Closely allied to standardization agreements, yet distinct from them, is the practice of adopting an association trade-mark or label. Whether derived from the "union label" scheme of labor organizations, or from the ancient practice of identifying the products of a particular producer, it is in any event calculated to stimulate demand by giving some assurance to buyers that the goods bearing the mark have been produced in conformity with some standard, either of excellence or of fair dealing. If the association label merely constitutes a basis for co-operative advertising and is used in connection with individual identification marks, each manufacturer standing behind his own products and assuming full responsibility for their character as represented, the practice would seem to constitute a wholly unobjectionable form of associated action. Such use of the common label is merely equivalent to an announcement that the producer in question is a member of the designated trade association. It does not mean, at most, anything more than that a minimum standard of quality has been reached or excelled. Competition between the various producers may continue to be active and unrestrained. In these circumstances, the practice is parallel to, though not identical with, the display in banks of a placard or certificate signifying that the institutions in which it appears are members of the Federal Reserve system.

[1] "Trade Association Activities," Department of Commerce, Washington, 1923, p. 52. A more or less formal distinction might be drawn between agreements *not* to manufacture or sell specified grades, designs, or sizes of articles and agreements *to* produce an article having some unvarying feature. But the difference is not considerable, for the latter type of agreement plainly implies that the parties are not to continue producing articles varying from, but possibly approaching, this standardized feature. This is true, of course, of any standardization of industrial practice. It may be observed that there are various manifestations of the standardization process which appear to have much the same relation to the law as the main type. Among these are standardization of contract forms, standardization of credit terms, standardization of auxiliary equipment supplied with the main produce, and most inoffensive of all, standardization of nomenclature—the adoption of uniform trade phrases and trade names.

That does not mean that every bank in which such a placard appears has adopted an identical loan policy; much less does it mean that the banking resources of the entire system are so far fused as to serve as a guaranty of the solvency of each of the members. It means only this: that the institution is a responsible banking office, regularly inspected by agents of the Federal Reserve Board and possessing certain privileges which enhance the liquidity of its funds.[1] In like manner, the use of a common trade label does not, as such, involve a unification of interests among the members of the trade association, nor does it necessarily partake of the nature of a joint marketing scheme. The prestige of the association may serve to stimulate demand, and the quality of the product may tend to be improved, but there is no obstruction of the free operation of competitive forces.

But should the uniform label adopted by a trade association purport to attest the exact quality and characteristics of the goods marketed under its impress, the arrangement would take on the character of a standardization program. The association, if challenged, would have to prove that in the circumstances of the given case the use of the common label did not unduly or unreasonably restrain competition for trade among its users. If nothing more were attempted than to prescribe a minimum standard of quality, in accord with ordinary conceptions of safety or usefulness, it is unlikely that the concert of action would be found legally objectionable. The common label would assist the buyer in gauging the quality of the goods and would not remove trade rivalry among sellers. But should the plan lead to the substitution of the common trade label for producer identification marks, or, what is more likely, to the subordination of the individual label to the association mark, the tendency to suppress free and effective competition might become so marked as to incur judicial condemnation. The question of legality would seem to hinge primarily upon whether the dominant label or mark—that is, the label or mark by which the buying public identifies the goods—is that of the individ-

[1] This parallel should not be pressed too far. The degree of interdependence countenanced or even fostered by law in the case of banking institutions is far greater, owing to their peculiar characteristics, than would be permitted among manufacturing and trading enterprises.

ual or the group. If the individual mark remains dominant, there appears to be nothing improper or unlawful in the subordinate attachment of a group label certifying the grade or standard of the goods. Many types of commodities have been marketed under both association labels and individual trade-marks without impairing competition in the industry. Apples, flour, milk, and lumber, to mention no others, have been subjected to such double certification, and the results have not proved burdensome to the public. Indeed, in most instances the plan has met with general approval both in and out of the trade. Notwithstanding the association label, freely competitive conditions appear to have been maintained—buyers having the opportunity of choosing among the varying inducements, in the way of price or service, offered by the different sellers. If, however, the dominant label or mark becomes that of the group, the practice might very well tend to destroy competitive rivalry under certain conditions. Suppose for example, a product which is distributed through well standardized channels of trade (so that competition in service is negligible), and which is customarily sold at so-called "convenience prices"—a nickel, a dime, or a quarter. Under such circumstances competition in respect to the quality or the quantity of the product would be the most vital feature of the competitive process. An agreement whereby every grade of such a product was subjected to rigid standardization would be open to the same objections as are brought against price-fixing schemes. In short, when an association label ceases to certify merely to a minimum standard of excellence, and leads to the cultivation of consumer favor for essentially a single product, it appears to invite, and may be expected to receive, judicial scrutiny.

While there has been no authoritative determination of the legal status of this type of association activity, Attorney-General Daugherty, in his correspondence with Secretary Hoover in February, 1922, directly attacked the practice of developing the use of common trade labels. He was asked whether an association may promote the trade of its members "by furnishing trade labels, designs, and trade-marks for the use of its individual members." He asserted, in reply, that "when several producers or dealers use uniform trade labels,

designs, and trade-marks it seems to me the inevitable result would be a uniformity in price." Apparently the Attorney-General had in mind here a situation in which the association mark or label becomes dominant, the producer's identification of his individual goods being practically eliminated; but there is nothing in the language used to restrict his condemnation to such a situation. In most instances it is very unlikely that this would be the outcome of the adoption of a uniform trade label. Unless the practice were accompanied by collateral arrangements designed to unify the interests of the associates on the producing or marketing side, the individual sellers would normally continue their rivalry for trade, in terms of price or service, if not of quality. In other words, just so long as the consumer's demand is attracted primarily by the distinctive offerings of the individual producer, the common trade label merely affords assurance of a minimum standard of quality.[1] In the illustration to which the Attorney-General pointed as bearing out his view—the adoption in the cement industry of minimum specifications for the commercial product—not only has there been no disappearance of the individual trade-mark, but there is reliable evidence that the price has remained a competitive price.[2]

As has been pointed out in earlier pages, standardization agreements and the adoption of common trade labels may be abused; these association activities may be utilized as vehicles for the undue curtailment of competition. In normal circumstances, however, they tend to serve legitimate ends in the regulation of competitive conduct. They are designed to eliminate some at least of the flagrant wastes which spring from unco-ordinated productive activity, to provide the consumer with some measure of protection against deficiencies in the quality of the product which he purchases, and to stimulate the demand for goods manufactured and marketed under responsible auspices. In the light of reason, it seems unlikely that the courts would condemn these practices.

[1] When the activity of the trade association in reference to trade marks, names, or labels is directed to the protection of the private insignia of its members, its obvious tendency to foster competition gives it a clearly legal status. See, for an example of this type of work, the description of the Trade Mark Registration Bureau of the Silk Association of America, in its 52nd Annual Report, 1924, pp. 45–46.

[2] H. P. Willis and J. R. B. Byers, "Portland Cement Prices," New York, 1924, p. 69.

CHAPTER XIII

DEVELOPMENT OF BUSINESS STANDARDS

A number of trade association activities which serve to regulate competitive conditions, have been examined and their status under the anti-trust laws noted. The essential purpose of these activities is to co-ordinate and rationalize the spontaneous working of competitive forces, as a means of stimulating productive efficiency and industrial stability. In so far as co-operation in these directions is primarily designed and actually operates to promote trade, it is in full accord with the demands of public welfare and does not contravene the inhibitions of public policy. The trade association simply operates as a clearing-house of facts and experience; essentially the constituent business units retain complete independence of action. But through their so-called "codes of ethics" and "standard practice" regulations, trade associations are undertaking, with increasing frequency and growing effectiveness, to develop from within what they deem to be necessary and desirable standards of business conduct.[1] It is the purpose of this section to examine the character of these efforts and their tendency, if any, to violate the dictates of public policy as expressed in the law.

§1. The Sources of Business Standards

In business, as in other spheres of human activity, the behavior of men is not regulated solely by the more or less rigid and coercive rules of law or the more or less flexible and impulsive dictates of individual interest. Between these two factors influencing conduct, which represent the extremes of definiteness and indefiniteness, of uniformity and

[1] Voluntary co-operation in this direction is not confined to trade associations. Such non-specialized organizations as the Rotary Clubs and the United States Chamber of Commerce take an active interest in the elevation of business standards. See e. g., "Principles of Business Conduct," a pamphlet published by the Committee on Business Ethics of the Chamber of Commerce of the United States, in which are reproduced the fifteen principles embodied in a resolution passed at the 12th Annual Meeting of the Chamber, May 8, 1924.

diversity, there are various other forces playing upon the individual will and shaping individual conduct. "Custom" is a term of varying compass which is commonly used to designate some or all of these intermediate forces. But if its meaning is restricted to those established usages which are bequeathed to us by tradition and enforced by common consent, there remains a not inconsiderable complex of forces which may be said to represent the collective aspirations of a group or society. This is the fund of guiding principles which make up morality. Whether or not it is true that morality is founded upon custom, it is certain that it has similar sanctions. The observance of moral rules, as of customary usages, is generally stimulated, not by coercive measures, but by the pervasive pressure of group opinion. In other words, the behavior of men is moulded not only by respect for organized authority and fear of organized power, and not alone by Adam Smith's "innate propensity" to follow self-interest; while these influences are universal and significant, it is also determined in part, and in no small part, by the dread of social disapprobation, as well as by the prospect of receiving the approval and acclaim of others. In the field of business affairs, as in other fields of human interest and human action, all of these forces are found to be operative in some measure. There are special laws applicable not only to business organization and business conduct as such, but also, in some cases, to particular branches of industry or trade. There are special customs, too, which have grown up in the business world as a whole and are peculiarly applicable there;[1] and within most trades there exist many usages handed down by tradition through a long past which are distinctive.[2] Similarly, moral principles, with their insistence upon honesty and integrity and fair dealing, have their place in the world of business affairs; and although at times they may seem to exercise small influence there, they are generally potent. Notwithstanding the weakness of the force of morality in some instances, it is always operating to mould business conduct in every field; for moral rules possess a universal quality and

[1] For example, the offering of discounts for cash payments.

[2] For example, in the coal trade it is customary to sell bunker coal by long tons and steam and domestic coal by short tons.

are more or less ubiquitous in their promptings. But the effectiveness of these principles of right conduct in developing business standards is conditioned by two important factors: first, by the clearness with which, through the mass of conflicting and confusing circumstances which always surround practical conduct, right and duty are recognizable; and, secondly, by the quickness and certainty with which the sanctions of social approval or disapproval are evoked.

For reasons which need not here be developed, the traditional professions—law, medicine, engineering, teaching, and the like—have achieved greatest progress in meeting these conditions and in rendering the force of morality an increasingly active supplement to law, and even, in a measure, a substitute for law, in harmonizing private impulse with the public interest. In most cases the professions have consciously and deliberately formulated the substance of their ethical canons, in order that they may serve as a reliable, if not an infallible, index of the specific import of the guiding principles of common morality as applied to the typical situations which are wont to confront their practitioners. And beyond this, through the development and maintenance of comprehensive organizations in all ranks, they have fostered a close, corporate unity of outlook among practitioners which tends to condemn evasions of professional responsibility whenever and wherever they may occur. While "professional ethics," both in theory and in practice, are by no means free from serious shortcomings, they have achieved very commendable results in many directions. In business, on the other hand, it is only within recent years, and largely through the instrumentality of trade associations, that ethical principles have come to be definitely formulated and machinery established to facilitate their enforcement, to the end that the dictates of morality may play a more significant part in the formulation of business policies and in the guidance of business practice. While the benefits accruing from these conscious efforts to develop business standards cannot, as yet, be confidently appraised, it is noteworthy that, with the growing spread of the conception of business as a profession, the older, somewhat elastic standards of business conduct are giving place to more rigid codes.

§2. The Nature of Codes of Business Ethics

By examining more concretely the nature and scope of the "codes of ethics" commonly sponsored by groups of business men, it will be possible to discover their relationship to the established principles of public policy within which business co-operation must operate. A business code of ethics, if it is what it professes to be, no more and no less, is a general statement of the course of conduct in relation to the common transactions of the given trade or industry which is consistent with prevailing moral principles as they are interpreted by those engaged in the particular business.[1] The adoption of a code of ethics involves an implicit recognition of the fact that sometimes the methods of "successful" business operation are at variance with the moral standards and long-run interests of the group as a whole and hence must be tempered by the infusion of ethical restraints.

[1] The following brief Code of Ethics, adopted in October, 1923, by the National Association of Farm Equipment Manufacturers, is believed to be fairly representative of the types of transactions and standards covered by these codes:

Whereas: Ethics, whether business or social, seem to have various interpretations relative to human duty, actions and the practices of human beings, yet, in a broad and true sense, means—"All things, whatsoever Ye would that men should do unto you, do Ye even so unto them," be it therefore,

Resolved: That the National Association of Farm Equipment Manufacturers adopts as a Code of Ethics the following:

1. Our Industry, being basic in character, affords us a distinct opportunity of serving society and should justify the exchange of ideas,—our ambitions should encourage us to perform our duties in a dignified and honorable manner, and endeavors should be to elevate the standard of our vocation. Our business should be conducted in such a manner that others will find it profitable and conducive to happiness to emulate our example, and furthermore that truth, honesty and courtesy shall prevail in all our dealings.

2. To respect the rights and privileges of competitors and not to interfere with or attempt to have cancelled any bona fide orders or contracts taken by a competitor.

3. To recognize business courtesies, and particularly courtesies in the field, and not to knock competitors or competitors' goods. If you cannot speak well of them and their products you can at least remain silent.

4. That in making, causing, or permitting to be made or published any false or untrue statement of or concerning the business policies or methods of a competitor, is unfair and should not be sanctioned or permitted.

5. That we will not solicit the services of employees engaged with our competitors without first notifying such competitor of our intention to do so and securing their consent.

6. That the willful or malicious interference by any person, association, or corporation, by any means or devices whatsoever, with any existing contract between an employer and an employee or agent of such employer, in or about the production, manufacture, transportation, or sale of any product, or the performance of any contractual duty or service connected therewith, such interference being for the purpose or with the effect of dissipating, destroying, or appropriating in whole or in part, the patronage, property, or business of another engaged in such industry is unfair.

In many instances, however, these ethical principles are stated in broad terms, when more definite pronouncements would be more helpful in guiding business concerns in daily practice. The scope of the business relations sought to be regulated by these codes of ethics naturally varies with the particular conditions which have led to their formulation in different trades. The emphasis is ordinarily placed upon those trade relationships in which have grown up abuses that, in the view of the men in the trade, urgently need correction. These may be employment relations, customer relations, competitor relations, or even public relations. But any code of ethics may embrace all of these relationships within the compass of its admonitions; indeed, every code tends ultimately to be thus comprehensive.

It should be noted, moreover, that whatever the general nature and scope of these statements of guiding principles, they are necessarily based upon the common notions prevailing in the trade of what constitute proper standards of fairness, honesty, and sound policy in business practice. While such codes may not be unanimously accepted, and are very seldom adhered to universally, it is an essential element in the very idea of a code of business conduct that it should represent a substantial body of opinion among the whole number of participants in the trade. No handiwork of outsiders, however well-intentioned, can be expected to enlist more than the casual attention, or perhaps the formal acceptance, of the men active in the trade; and no attempt of a clique of insiders to foist their peculiar notions upon the large majority is likely to meet even tolerant acquiescence. Accordingly, while codes of ethics may be unduly narrow in their scope and may articulate their rules of action in terms so general as to render their influence almost negligible, under the complex circumstances of practical affairs, in serving as guides to business conduct, they do possess the undoubted merit of seeking to develop business standards on the basis of the concrete needs and actual outlook of the persons and firms engaged in the given trade or industry. As a supplement to the more specific mandates and inhibitions of legal rules, these attempts at co-operation may ultimately serve to stimulate the independent development

from within, on a voluntary basis and in a democratic spirit, of sound business standards, as well as to facilitate the enforcement of the legally established safeguards against unfair or improper business conduct.

§3. The Legal Validity of Business Codes

What is the legal status of the concert of action represented by the formulation and enforcement of these codes of ethics? In so far as the admonitions of the code coincide with the mandates of law, no question of legality arises. It is clearly not unlawful for a trade association to urge upon its members lines of conduct which the law sanctions, or to condemn those which the law prohibits. From the practical standpoint, however, even if an association, in its efforts to improve business standards, were to occupy itself solely with matters of business conduct which fall clearly within this lawful province of co-operative action, it would find ample opportunity to justify its activity. There are many practices which the law condemns, but which tend to persist under the influence of unscrupulous leadership or under the exigencies of keen rivalry;[1] and there is very much which the law sanctions, but which the pursuit of business profits does not always tend to foster.[2] Truth in

[1] For example, a firm manufacturing glue has been compelled by order of the Federal Trade Commission to cease its practice of paying five cents per pound to the superintendent of a cabinet factory upon the amount of the orders he secured for the respondent. In two years the bribes paid this dishonest employee had reached the not inconsiderable sum of $34,000. *Federal Trade Commission v. Baeder, Adamson Co.*, 4 F. T. C. Dec. 129 (1921). The extremes of unlawful simulation of trade names still surviving in some quarters may be illustrated by the efforts of a certain oil jobbing and refining firm to place upon the market a brand of lubricant called "Mobile Oil" in competition with the widely advertised "Mobiloil." *Federal Trade Commission v. Best Oil Co. et al.*, 5 F. T. C. Dec. 92 (1922). The reports of the Federal Trade Commission are replete with instances of not less unscrupulous practices in other trades.

[2] As representative of ethical canons which tend to promote ends fully sanctioned by law, the Code of Ethics adopted by the National Varnish Manufacturers' Association is here reproduced. This code has also been unanimously adopted by the Paint Manufacturers' Association of the United States and the National Paint, Oil and Varnish Association.

CODE OF ETHICS

"Codes of Ethics Bind Only the Ethical"

Whereas, The National Varnish Manufacturers' Association is an organization operating for the mutual benefit of the industry and the public; and

Whereas, "The objects of this Association are to advance the interests of the varnish manufacturers of the United States; to correct, as far as possible, such evils

advertising is one example, and fair, if not generous, treatment of employees, as well as the rigorous enforcement of health and age standards, are others. There has also been developed, latterly, a considerable body of administrative as well as statutory law marking off what trade competitors may not do in their relations with their customers, their business rivals, their employees, and the general public. Under the blanket prohibition of "unfair methods of competition," as interpreted by the Federal Trade Commission,

as may exist in the business and to cultivate friendly relations among the members;" and

WHEREAS, This Association, through the frank and lawful co-operation of its members, at all times endeavors to correct trade customs which are contrary to sound business principles and to the highest standard of ethics; and

WHEREAS, Experience has shown that formal Codes of Ethics embodying correct standards for business relations are essential to the development and orderly conduct of every trade or profession; and

WHEREAS, Each vocation requires a Code especially adapted to its own requirements setting forth definite and concise rules of conduct to govern in the mutual relations of its individual components; now, therefore, be it

Resolved, That this Association adopt as a rule and guide for the conduct of its members in their business relations one with another, a standard Code of Ethics; and be it further

Resolved, That the following Code of Ethics be now adopted, subject to such additions or changes as may, from time to time, be determined upon:

We, members of the National Varnish Manufacturers' Association, recognizing our responsibilities and obligations to promote the public welfare, and to maintain honorable, fair and friendly relations among men, do pledge ourselves:

1. To compete always with fairness and honesty, seeking patronage on merit and service; to refrain from false derogatory reference, written, oral or printed, to competitors or their products; and from the circulation of harmful rumors regarding such competitors' products or their personal or financial reputation; to strive by sincere and intelligent co-operation with our competitors in all lawful ways to increase the efficiency and service to the public of the industry as a whole; to base our advertising exclusively on the merit of our own products and the value of our own service, without false, derogatory reference to the products of competitors or misleading comparisons therewith.

2. To be guided by a spirit of justice, honor and fairness in all our relations with members of the allied trades, realizing that the standard of ethics maintained in our own industry must vitally affect the standard observed in associated industries; to encourage the adoption by the allied trades of similar Codes as guides to govern their practices; and to discourage unfair trade practices in those trades, even though such practices might, at times, be to our own immediate advantage.

3. To represent our products truthfully in advertising, labeling and branding; avoiding therein all false or misleading statements or descriptions.

4. To avoid and actively strive to prevent all forms of commercial bribery or corruption by members of this Association and by the industry in general, and to this end we pledge our support to the Federal Trade Commission in locating and prosecuting individuals guilty of such practices.

5. To adhere faithfully to the rules of conduct herein set forth and to inspire our fellow members to do likewise, believing that the Golden Rule is the only safe guide to conduct in the relations among men.

6. Any charge of violation of this Code shall be referred by the President of the National Varnish Manufacturers' Association to the Board of Directors for careful consideration and appropriate action.

so-called commercial bribery has become a recognized offense,[1] and misbranding, or even branding which tends to mislead, has been adjudged forbidden both by the Commission and by the United States Supreme Court.[2] In general, unfair competition has been interpreted to include at least business practices opposed to good morals (because characterized by deception, bad faith, or oppression), and business methods calculated unduly to hinder competition or to create monopoly.[3] Local price-cutting, for the purpose of throttling competition, is specifically prohibited by the Clayton Act. Numerous state laws limit the terms of employment contracts to a minimum of hours and even of wages, and establish standards of working conditions. The illustrations might be multiplied many fold. There is clearly a broad field for co-operative endeavor in the formulation and enforcement of codes of ethics, even if these guiding principles were directed only to promoting compliance with legal mandates.

But no progessive trade association will be content indefinitely to confine its efforts to raise the plane of business conduct within the trade to the cultivation of mere law observance. The very fact that it devotes its entire energies in this direction to the fostering of such a virtue might be construed as an indictment of its membership. But when it extends the compass of its good-behavior regulations beyond this well-charted sphere, legal difficulties may readily arise. When a trade association undertakes to condemn practices which its members regard as essentially unfair or unethical, but which are sanctioned by law, it must proceed cautiously; and there is even greater danger, of course, in the encourage-

[1] The Federal Trade Commission has issued numerous "cease and desist" orders in cases involving complaints against "commercial bribery," and many manufacturers and dealers have changed their methods as a result of the attitude of the Commission. The issue has not yet reached the Supreme Court, however, and on the special facts of the only two cases which have thus far been litigated, the lower federal courts have not sustained the orders of the Commission. See *New Jersey Asbestos Co. v. Federal Trade Commission*, 264 Fed. 509 (1920); *Kinney-Rome Co. v. Federal Trade Commission*, 275 Fed. 665 (1921).

[2] *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483 (1922), reversing the decision of the Circuit Court of Appeals in 272 Fed. 957 (1921).

[3] *Federal Trade Commission v. Gratz*, 253 U. S. 421 (1920). See also Report of Federal Trade Commission for Fiscal Year Ended June 30, 1922, p. 4, commenting thereon.

ment, through codes of ethics, of business practices which run counter to the policy of the law. It would be quite beyond the scope of this study, if not indeed impossible in the very nature of things, to undertake an exhaustive examination of the whole range of articles which might conceivably be included in a code of business ethics. It must suffice to note the character of two or three representative regulations which are designed to establish concrete rules of action, and to see whether they may not, in spite of the best of intentions, involve an association in difficulties with the Department of Justice or the Federal Trade Commission. It is fundamental, of course, that no co-operative effort to develop business standards can be given a shield of immunity from the prohibitions of the anti-trust laws by fair phrases or protestations of benign purpose, if it tends actually to restrict the free flow of commerce or to direct arbitrarily the normal course of trade.

Let us consider, by way of illustration, a provision in a code of ethics adopted in 1918 by the International Monumental Granite Producers' Association.[1] The fact that this provision does not appear to have come under the scrutiny of the prosecuting authorities or of the courts will facilitate its free discussion. One article of the code declares that, "as following the general policy of maintaining fair and reasonable prices, producers should consider the initial low bidder entitled to a contract, and decline to change prices once quoted unless changes in the quantity of or the specifications for the work in question have been made." This rule attempts to establish a new standard of business conduct. In most lines of manufacture, and to a lesser degree in trading operations, sellers frequently make their offers as high as they deem likely of acceptance, and then, under the pressure of lower offers by competing sellers, they often reduce their offers to the point below which they are unwilling to produce or furnish the goods in question. The rule cited seeks to force each seller to make but one bid—the

[1] Handbook of the International Monumental Granite Producers' Association, Inc., Boston, 1919, Art. III of Code of Ethics adopted August 13, 1918. A substantially identical provision had appeared in the Code of Ethics adopted by the National Commercial Fixture Manufacturers' Association some two years earlier. *Cf.* Art. XII of their published Code.

minimum amount for which he will do the job or provide the goods. Since, under section five of the Trade Commission Act, sellers are not required to regard their initial offers as final, it cannot be argued that such an agreement, calculated to deprive sellers of the privilege of revising their offers, serves to contribute to the effectiveness of legally established standards. It does not follow, however, that the adoption and enforcement of such a regulation is necessarily unlawful. The above rule of the Granite Producers' Association might be deemed a legitimate exercise of co-operative power. Considerable advantage may accrue from the establishment of a system of single bidding in the manufacturing industries, just as the one-price system in retail trade has generally been found to promote the public interest. It might tend to reduce bids to the lowest practicable level, and minimize the opportunities for discriminatory treatment of different trade customers. But the rule of conduct under consideration is subject to abuse, and may receive the skeptical scrutiny of the courts under the Sherman Act. It unquestionably restricts the freedom of action of the associates in the vital matter of price determination. The conditions surrounding the production of a commodity, because of general fluctuations in the raw material or labor markets, or because of special developments peculiar to the operating or financial position of particular manufacturers, may change so drastically after the submission of the initial bids that their revision may not only be fully justified but practically imperative. Moreover, the fact of general agreement not to revise initial bids might afford sufficient security against competitive diversion of business to stimulate high bidding rather than low bidding. All of these circumstances must be taken into account in testing the validity of such an agreement as to business conduct. The same considerations of purpose and effect would be applied which were suggested by Justice Brandeis in discussing the limitations upon competition under review in the Chicago Board of Trade case.[1] Should it appear to the court, in view of all the special circumstances surrounding the given case, that the arrangement tends to regulate, rather than to suppress, competitive condi-

[1] *Chicago Board of Trade v. U. S.*, 246 U. S. 231, 238 (1917).

tions, it might be held to satisfy the "rule of reason"; otherwise it would be condemned. The task of the court is to determine whether, on the whole, the competitive process and the public interest served thereby are promoted or impaired by the restrictions generated by such a canon.

One further illustration, involving a provision such as is sometimes found in codes of ethics, will suffice for the present purpose. The Paint Manufacturers' Association of the United States requires that every manufacturer, as a condition of membership, should sign what is known as a non-exchange agreement.[1] Through this agreement he pledges himself and his staff not to accept any paints of a rival manufacturer, member or non-member, by way of exchange in filling an order for goods from any dealer. In other words, each of the associated paint manufacturers agrees that in selling his products he will make no concessions, or allowances, for goods in dealers' hands other than his own products. This arrangement was designed to eliminate an alleged evil which was claimed to be imposing a serious drain upon the profits of all the manufacturers: namely, the expense and vexation of opening new "accounts" of a temporary character. According to the recent year books of the association, the agreement has worked satisfactorily to minimize this loss from the frequent shifting of dealer patronage. Does it tend to interfere unduly with the free operation of competitive forces in the paint industry? It may be argued that it erects an artificial barrier against the encroachment by a growing and aggressive manufacturer upon the sales domain of his competitors. Since dealers often prefer to carry, and are frequently permitted to carry, only a single line of such products, it becomes difficult, under the agreement, to dislodge established trade relationships. On the other hand, it may very reasonably be contended that on the whole the rule is beneficial—not only because it serves to discourage meaningless shifting of patronage, but because it tends to eliminate the vicious less-than-cost sales of displaced paint, without hampering either price competition

[1] See Year Book, Paint Manufacturers of United States, Philadelphia, 1924, pp. 6–8, 47–49. This agreement has also been adopted by the National Varnish Manufacturers' Association and has been made mutual between the two associations.

or quality competition in the sale of fresh paint. In this view, the non-exchange agreement may be regarded simply as a regulation of a minor feature of service competition, not unlike the standard practice rules adopted by the Rubber Association of America relative to the adjustment of claims for defective tires.[1] It is not surprising, therefore, that this agreement has remained operative for many years without encountering legal attack. The courts would probably deem it a reasonable regulation of competitive con duct.

A distinction is sometimes sought to be made between rules of conduct regulating relations between sellers and buyers and rules affecting relations among competitors. It is contended that only those regulations which directly restrict the freedom of competitors are subject to attack under the law. There does not appear to be any sound foundation for the distinction. A comparison of the two illustrations just discussed will reveal the substantial identity of the issues involved. The rule of the Granite Producers' Association as to the finality of initial bids may be regarded primarily as a regulation affecting directly the conduct of competitors; the non-exchange agreement of the Paint Manufacturers' Association assumes, at least nominally, the aspect of a regulation of buyer and seller relationships. Yet, as we have seen, both are subject to judicial scrutiny from much the same angle. The character of competitive conduct is bound to influence the relationship between sellers and buyers; and the character of established buyer-seller relationships inevitably influences the conduct of competitors. Take, for example, the admonition to sellers, frequently incorporated in codes of ethics, not to deliver inferior or misrepresented goods to buyers. The seller ordinarily resorts to such objectionable practice because, among other things he can, by so doing, quote a lower price than his business rivals. An ethical canon, therefore, which seeks to eliminate this practice is calculated to protect competitors as well as buyers against the ill effects of the dishonest manœuver, and to forestall the

[1] See "Rubber Association Activities During 1921," Rubber Association of America, Dec., 1921.

likelihood, through the pressure of self-preservation, of the general spread of such tactics. The legal status of concerted efforts to develop what are deemed to be desirable business standards is determined by their actual or probable effect upon the competitive process, and hence upon the public interest, whether, in the first instance, they appear to regulate buyer-seller relationships or relations among sellers.

§4. Uniform Contract Forms and Standard Practice Regulations

The practice of adopting uniform contract forms provides a further illustration of the close relationship between agreements affecting transactions of buyers and sellers and those affecting the conduct of competitors. This practice is seldom brought within the scope of codes of ethics; but it is sufficiently like an ethical canon in principle, as tending to standardize the conduct of business, as well as in effect, as tending normally to elevate the plane of business competition, to warrant brief notice in this connection. There are many features of sales contracts which are of minor significance in the ordinary course of business and which may be mutually regulated without any appreciable impairment of the vigor of competitive rivalry for sales.[1] Such matters as the allowable variation in quantity delivered from quantity ordered, agreement upon the event upon which title to goods will be assumed to pass, or the provision of methods of settlement in the contingency of disagreement upon quality, may clearly be determined by joint action of sellers and incorporated in all contracts. Such regulations are merely designed to clarify, through sharper definition, the rights and obligations of the contracting parties, and tend to minimize litigation. This facilitates rather than obstructs active competition upon the essential terms which must be negotiated for each transaction; for comparison of the major differences between alternative offers may be

[1] For example, the Associated Knit Underwear Manufacturers of America, in conjunction with the National Wholesale Dry Goods Association, have adopted a "John Doe Knitting Company" form of sales contract which is recommended for use by their members. The form contains six unexceptionable conditions regarding credit, delivery, risk, and settlement of disputes by arbitration.

the more readily made when there is no variation in incidental details and with respect to remote contingencies.[1]

But there is always the possibility that the agreement upon uniform contract provisions will not be confined to minor and incidental stipulations, but will reach into matters of vital sales significance. Under such circumstances it may destroy, or unduly weaken, competitive rivalry among the association members. This danger is particularly imminent when the provisions relate to matters of price policy. For example, a stipulation may be adopted requiring all buyers to pay, in addition to the agreed price, a fixed service charge for handling, or providing that the sellers will in no instance absorb into the sales price, charges for incidental service in connection with sale and delivery.[2] Such provisions, if not

[1] The following "Customs of the Trade" which are in use by each company belonging to the Electric Steel Founders' Research Group (as reported in the *Foundry Trade Journal*, July 19, 1923, Vol. 28, p. 56), illustrate the character of the provisions which tend to eliminate misunderstandings in the execution of contracts between purchaser and producer:

"1. Suitable pattern equipment for economical moulding shall be furnished by customers.

2. The foundry will not be responsible for correctness of pattern equipment to blue-print, except when such equipment is made for customer under supervision of foundry.

3. Repairs on pattern equipment shall be paid for by customer, except when occasioned by carelessness on part of foundry.

4. Pattern equipment must have distinct colors to identify separately the core-prints, machine surfacings, and rough casting.

5. All patterns, core-boxes, and loose pieces thereof must be properly numbered for identification.

6. All transportation charges on pattern equipment to and from foundry shall be paid by customer.

7. The foundry will not carry insurance on customer's pattern equipment.

8. Free replacement will be made of defective castings if reported and returned to foundry within a reasonable time.

9. The foundry will not be responsible for any expense on defective castings incurred by customer.

10. The customer will be charged with the cost of moulds and cores discarded by the foundry, due to change in patterns or core-boxes."

These resolutions serve to clarify the relations between the foundrymen and their customers and may be expected to minimize litigation. While it may be contended that the agreement that pattern equipment shall be furnished by the customer limits the freedom of action of the associates in denying them the privilege of negotiating contracts for moulding castings simply on the basis of blue-prints furnished by the customer, the regulation doubtless constitutes a reasonable means of securing accuracy of specifications for the work ordered. Once this is granted, the remaining stipulations naturally follow. They are merely designed to expedite foundry work, and to define explicitly the legal responsibilities of the contracting parties. No undue burdens are imposed upon customers and no substantial restrictions are involved upon the competitive rivalry of the foundrymen.

[2] This practice may be illustrated from the automobile accessory trade. At the annual convention of the Automotive Equipment Association held in July, 1921,

altogether negligible in their scope and influence, might amount to unified control of one or more element in the price of the commodity sold or service rendered. Price manipulation may likewise follow from association agreements for the guarantee of purchasers against price declines. While an individual manufacturer or seller may reasonably agree to guarantee his purchasers against price declines, as a means of stabilizing the demand for his products, an agreement among competitors to this effect may tend to interpose artificial barriers against all price reductions. But the general practice of adopting "customs of the trade" or "uniform contract forms" has not been subjected to legal attack.[1] This in itself tends to confirm the view that when confined to the stipulation of minor features of the contracts of sale the practice is unobjectionable from the standpoint of public policy. But in many instances it has been still further safeguarded against attack. Even with regard to the more or less collateral matters covered by the provisions, the standardized forms frequently leave blanks to be filled in with the special quantitative or qualitative

there was adopted a catalog of "Fair Trade Practices," section 23 of which reads as follows: "The nature of this business, together with the trend of the times, has brought parcels post and small shipments into very general use, and such orders require prompt attention and preferred service, and to cover the expense of same, a service charge of not less than five cents should be made for each parcel post shipment, with a minimum charge for the merchandise of twenty-five cents plus postage and insurance."

[1] That specific abuses have arisen in connection with the formulation of standards of business conduct and uniform contract provisions is evidenced by the character of some of the prohibitions in recent equity decrees. In the tile decree, *U. S. v. Tile Manufacturers' Credit Association*, U. S. District Court, S. D. Ohio, In Equity, No. 21, Nov. 26, 1923, the defendants were enjoined from agreeing, among other things, "to establish or maintain uniform extra charges for built up letters, for numbers or for beveled edges," sec. 5 (e), "to establish or maintain uniform limitations on the proportionate amounts of the lower grades of tile sold," sec. 5 (f), "to establish or maintain uniform terms of sale," sec. 5 (i), "to establish or maintain uniform conditions on or for the acceptance of orders," sec. 5 (j), "to establish or maintain uniform charges for barrels, half barrels, or boxes used for shipping tiles; to refuse to allow credit for old packages returned; to quote prices with package charges included, and to charge for packages whether used in shipment or not," sec. 5 (k). In like manner, in the cement decree, *U. S. v. Cement Manufacturers' Protective Association*, U. S. District Court, S. D. New York, In Equity, No. E 22–25, Dec. 13, 1923, the defendants were enjoined from agreeing "to establish uniform charges for bags, or uniform credits for bags returned in good condition," sec. 9 (d), "to guarantee prices against decline," sec. 9 (m), "to make uniform charges for bin tests, and/or to require the purchaser to pay for such tests," sec. 9 (n). Upon appeal to the Supreme Court (October Term, 1924, Docket No. 551. Decided June 1, 1925) the judgment of the district court in this case was reversed.

terms agreed upon in each instance; and provision is often made that only in the absence of special agreement to the contrary are the standardized terms to be given effect.[1] In spite of such limitations, however, these uniform stipulations accomplish their primary purpose. The introduction of clauses referring to the particular subject-matter, however wide the leeway to the individual associates, furnishes the necessary assurance that the contingencies covered by them will not be left entirely unprovided for, and that part of the obligations involved will not remain vague and undefined. So long, therefore, as the associates are reasonably free to choose whether or not they will follow the form contracts agreed upon, and so long as the provisions themselves do not reflect an intent to hamper unduly the process of competitive market adjustments, the legality of the practice does not appear to be open to serious question. It is designed, normally, to regulate competition for the purpose of promoting certainty and definiteness in business dealings.

§5. The Possibilities of Voluntary Development of Business Standards

In sum, then, the principles of business conduct promulgated by trade association codes of ethics and the guides to "standard practice" reflected in uniform contract forms may be rendered vital factors in the voluntary regulation of economic processes. Significant opportunities are made available through these channels for the promotion not only of common decency among men, but of a more wholesome and cordial atmosphere in which to carry on the everyday transactions of the business world. The development of business standards through the co-operative activity of the actual participants in a given trade or industry holds promise, on the one hand, of rooting out effectively a wide

[1] For example, among the "Conditions Adopted by the Heating and Piping Contractors' National Association" for attachment to proposals submitted by members appears the following: "Unless special terms are made at the time of entering into contract, it is understood that payment of 90 per cent monthly of the value of materials delivered, as well as labor performed, are to be made, and the balance paid on completion." It is manifest that the adoption of a uniform settlement policy in such terms stands on a much more secure footing in the law than would a rule which omitted the alternative.

range of acknowledged abuses which are positively condemned by law, and, on the other hand, of elevating the plane of competitive conduct, in realistic fashion and in practically attainable measure, beyond the minimum requirements of law. The pressure of group opinion is frequently more potent than the coercive sanctions of legal rules; and the scope of self-regulation is broader and more flexible than that of governmental enactment. And while it is true that agreement upon business conduct, however legitimate its professed purpose, is more clearly subject to subversion than the mere co-operative provision of knowledge and information as a basis for independent action, such agreement may promote rather than jeopardize the public welfare, and may be just as indispensable as the interchange of technical and economic data for the intelligent ordering of industrial and commercial processes. Possibilities of abuse obviously lurk in the formulation and enforcement of codes of ethics and in the standardization of contractual obligations. But these abuses can be readily reached under the anti-trust laws. The essential character of the activity of trade associations in developing business standards is constructive and legitimate. Like all of the activities surveyed in this Part, it seeks, through co-operative effort, to render more effective and more beneficent the spontaneous functioning of the competitive system.

PART IV: ASSOCIATION ACTIVITIES ESSENTIALLY UNRELATED TO COMPETITIVE CONDITIONS

CHAPTER XIV

COMMERCIAL AND INDUSTRIAL RESEARCH

The activities described in the following chapters serve to promote constructive improvement in many elements of the environment of commercial and industrial enterprise. They tend to stimulate efficiency in producing and marketing operations, to encourage good-will in labor relationships, to reduce the friction resulting from business controversies, and to render trade opinion more representative and more effective in public counsels. Since they exert a definite and frequently significant influence upon the organization and processes of modern business, they cannot be deemed altogether irrelevant to the actual functioning of the competitive system. In so far, at least, as the fruits of such co-operative activity are confined entirely to the participating associates, the conditions of competitive rivalry are manifestly influenced by these types of business co-operation. They may be said to be essentially unrelated to competitive conditions only in the sense that neither in principle nor in practice do they normally seek to impose arbitrary restrictions or artificial limitations upon the free course of trade. Both in purpose and effect they are designed to achieve ends deserving of warm public approval. The fostering of advance in the technical arts, for example, clearly operates to the general economic advantage of the community. Associated effort in the various other directions to be discussed tends to produce similarly advantageous results. Accordingly, this group of association activities, no matter how intensively or extensively pursued, is generally free from attack under the anti-trust laws. The possibilities of restraint upon business competition are so negligible and remote that no legal obstacles are interposed against the full and fruitful development of these types of business co-operation unless, as previously noted, they are directly associated with other lines of association work which are clearly illegal.

§1. The Nature and Advantages of Co-operative Research

If, as has been suggested frequently in the course of this study, the idea of a clearing house of information be taken as the germ and root of the trade association movement, it is both logical and natural that one of the outstanding developments in the growth of the movement should assume the form of constructive contribution to trade knowledge. It soon becomes apparent, as means are provided for making available to an industry the current facts and the currents of opinion by which those engaged therein may shape their conduct more intelligently, that this is but the beginning of a broader and more basic service. While acquaintance with prevailing methods and conditions is a valuable asset in business management, knowledge of ways and means to improve commercial and industrial processes is even more valuable. If the service rendered by a trade association in keeping its members better informed about actual conditions is helpful, its efforts to introduce them to new alternatives of method and procedure promise to be still more helpful.

Moreover, this problem of extending the boundaries of knowledge is essentially a problem adapted to co-operative attack.[1] In the academic field this circumstance was realized many years ago, and the organization of universities and scientific societies represents a solid and emphatic recognition of the advantage of developing research activity co-operatively. In the industrial field the advancement of the technical arts and of commercial methods is likewise stimulated by the give and take of numerous minds concentrating attention upon identical or closely related lines of investigation. Fruitful and practicable ideas, as distinct from philosophical speculations and literary fancies, are not generally conceived in the cloistered recesses of recluse minds. They are the product of suggestion, correction, addition, adaptation, and revision. They are like the steel which constitutes one of the basic materials of modern economic life—never found in the ultimately serviceable form, but produced only after

[1] See B. E. Livingstone, "Constructive Scientific Research by Co-operation," *Science*, Vol. LI, 1920, pp. 277–283.

varied elements have been fused, refined, mixed, tempered, and moulded. Co-operative effort provides the most promising basis for effective research undertakings.

Not only are inventions and improvements best fostered through organized co-operation, but such co-operative endeavor provides added assurance that the fruits of research will be harvested by those who have broken the sod and have labored in its cultivation. When experimentation and study in industrial processes and commercial practices are conducted in haphazard fashion, without concert or co-operation, it may frequently happen that those who have carried forward the work most sedulously are deprived of the advantages of discovery. Since it is inexpedient, if not impossible, even under the most chaotic conditions, to hold back indefinitely the interim results of sustained investigation, the final far-reaching or revolutionary improvement which may cap a long series of arduously achieved advances may be made quite casually by an independent competitor who has contributed little or nothing to the indispensable foundation-building. Though he has not borne his share of the necessary outlay of time, money, or resourcefulness, he may be in position, with letters patent, to exclude from the exploitation of the improvement those who have done most to make it possible. Furthermore, long-continued and costly research, particularly in matters of commercial practice, may result in betterments which are unpatentable, and so available to every one, including those who have paid no portion of their cost. And more frequently, perhaps, a decided improvement may be struck upon by some independent investigator, only to be found unusable save in conjunction with another and antecedent improvement protected by patent. Under such circumstances the exploitation of the new method, device, or process becomes subject to the stipulation of arbitrary and onerous terms by the conflicting patent-holder.

Beyond all these considerations of relative advantage and relative justice to the private interests involved, there is the larger issue of the conservation of social resources. With the scattered and unrelated prosecution of experimental studies, there is bound to emerge a large measure

of overlapping of effort and duplication of equipment.[1] The attendant waste of the all too limited funds available for research activity affords one of the most striking illustrations of the deficiencies of an individualistic system carried to irrational, even if logical, extremes.

The foregoing considerations counsel the establishment and maintenance of co-operative agencies for industrial and commercial research. Such co-operation tends to render research undertakings more fruitful, to abate the maladjustments resulting from business rivalry in the development and exploitation of patents and improved methods, to extend the opportunities for progressive operation and administration to small-scale enterprises incapable of independent study and experimentation, and to eliminate the social wastes of competitive research. Nor is the stimulus of self-interest for the promotion of this type of endeavor entirely lacking. Trade-wide participation in the achievements of co-operative research provides an adequate motive for its effective prosecution—and at only one remove from the independent business unit. The profit urge is still retained, though not as so dominant or exclusive a factor. And it is supplemented by the spirit of confidence which springs from associated effort and mutual support, and by pride in the prospect of collective contribution to the advancement of the useful arts. If, then, there is sound warrant for stimulating industrial and commercial research on a co-operative basis, how better can such co-operation be organized than through trade associations? These agencies provide the logical medium for directing and supporting the specialized studies which under modern conditions have become indispensable to the progressive development of industrial technique and commercial practice. In recogni-

[1] As late as 1917, in a report on "Industrial Research in the U. S. A.," published by the then newly organized Department of Scientific and Industrial Research of the British Government, appeared the following significant declaration (p. 44): "As yet little has been done to prevent overlapping by which the resources of several institutions may be absorbed on the same problem, which is solved no more completely by all of them than it is by any one. Still less is there at present any comprehensive scheme of research applying to industry in the United States as a whole, and only in such interests as agriculture, and in a lesser degree mining, is research organized on anything approaching national lines. On the other hand, the development of extensive laboratory facilities in manufacturing corporations, universities, and Government institutions demands and must tend inevitably to some form of co-ordination, so as to avoid wasteful overlapping."

tion of this fact the British Government, for example, has been subsidizing, since the war, industry-wide associations which engage in scientific research for the improvement of their processes and their products.[1] This policy has very wisely been employed, however, to promote the establishment of research activity in the industries, rather than as an aid in its maintenance.[2] All of the twenty-four trade associations which have been receiving grants from the million-pound fund provided by the government are expected within a five-year period to become self-supporting.[3]

§2. The Problems of Research Activity

The nature of the problems which research agencies, sponsored by trade associations, may and do undertake to solve is no less varied than the range of manufacturing and mercantile operations of the members of each association. They extend from such problems as facilitating the extraction and the preservation in storage of raw materials to the determination of the most convenient sizes of consumer packages and of the most effective ways of instructing consumers as to the uses of the finished product. On the technical side alone let us note, for example, the wide sweep of inquiry which research in the cotton manufacturing industry may take. The illuminating preliminary report of the Provisional Committee on Research and Education for the Cotton Industry will be quoted for this purpose.[4] While this is the report of a British body concerned primarily with the problems of its own domestic industry, it is manifest that the reasoning is quite as applicable to American conditions as it is to the situation in the Lancashire cotton trade to which it was addressed.[5] The Committee directs attention, among other things, to the following:

[1] The Act of Parliament passed in 1917–18 stated, as its purpose, to make grants "over an agreed period to approved trade associations for research to supplement the funds of the associations." Report of the Committee of the Privy Council for Scientific and Industrial Research for the year 1922–1923, pp. 20–22.

[2] *Ibid.*, pp. 3, 24.

[3] *Ibid.*, Appendix VI, pp. 116–120.

[4] Published serially in the *Manchester Guardian* during the summer of 1917, and later reprinted by the Committee, Manchester, 1917. The quoted excerpts are taken from pp. 14–17 of the reprint.

[5] *Cf.* J. R. MacColl, "The Application of Scientific Research to One Industry," Bulletins of National Research Council, Vol. I, p. 20. See, also, H. E. Howe, "Economics of Research," an address before National Association of Cotton Manufacturers, Transactions, 1919, pp. 260–270.

"Let us beware of thinking, either, that Cotton Spinning and Cotton Manufacture are nothing but mechanics. . . . Granted that the cotton trade has harnessed steam power to some purpose, what about all the other sources of power? All scientific knowledge is power, and organized industrial research is the harnessing of the myriad forms of this power to the purpose of industry and trade. Take chemistry, for example. . . . The aniline dye is not the only application of chemical knowledge to the cotton industry which has been neglected. The chemistry of starch, which is used in immense quantities . . ., remains practically unknown; there is little real knowledge of the composition of the cotton fibre itself; and the researches on cellulose . . . by distinguished chemists have been almost entirely neglected.

"The cotton trade has made even less use of the science of physics and the art of exact measurement. . . . To give an example, it is usual to test only the tensile strength of 'twist' before using it, as there are no methods whatever available for testing the two equally important properties of resistance to friction and of elasticity. . . .

"Not only chemistry and physics, but botany, too, has been neglected. The very basis of the cotton trade is a vegetable product, yet how little has botanical research contributed to the problems of cotton-growing. . . . Different kinds of material and different ways of finishing require different forms of cotton fibre. It is one thing to say generally that different kinds of fibre are required; quite another and much more difficult thing to say exactly in what way different. The cotton user does not really know except in the most vague and general terms what his requirements are. . . .

"Thus there is a large territory marked out for exploration. The cotton trade touches the boundaries of sciences at a dozen points . . . . How greatly the cotton industry depends on mechanical science every one understands, though far too many are ready to assume that we have reached the limits of what mechanical science has to teach for the industry. But what of these other sciences of physics, chemistry, and botany? Each of them has secrets of value to the trade if we will discover them. The trade alone cannot discover them, but only the trade in close and intimate alliance with scientific research. Individuals alone cannot find out these secrets, but only individuals banded together in an association for research. This, then, is the *prima facie* case for the formation of a great Research Association in the cotton trade."

But in such a wilderness of ignorance just where and in what direction are groups of forward-looking business men to start hewing a pathway to knowledge? Some choice

must obviously be made among the multitude of baffling problems which invite investigation. The question of the pursuit of commercial research as against industrial research in the narrower sense, dealing primarily with technical processes, is ordinarily resolved without difficulty. It is often determined by the nature and limitations of the field within which the trade association functions. No issue was presented on this score, for example, to the National Retail Clothiers' Association when the decision was made to prosecute a comprehensive and thoroughgoing survey of the retail distribution of men's clothing.[1] But in many cases, with the trend toward integration of industry and toward more direct channels of distribution in trade, the question of relative emphasis upon improvement in manufacturing and improvement in marketing has become acute. Moreover, the choice is complicated by the interdependence of the two spheres. A market analysis that is not built upon accurate knowledge of the composition and properties of the product is bound to be faulty and may be misleading. Conversely, a scientific investigation of productive processes cannot safely be carried far without an adequate understanding of the requirements of the ultimate users of the product. The experience of the National Canners' Association, which has maintained a technical research laboratory for a longer period probably than any other American trade association of prominence, tends to confirm this view. The association has not found it feasible to concentrate its attention solely upon problems incident to the manufacturing processes of the canning plant, such as heat penetration of canned foods, their discoloration in processing, and the effects of objectionable elements in water supply, although such studies have naturally constituted the major part of its work. The successful pursuit of these researches has unavoidably led to the extension of the field of investigation both backward and forward from this focal point. Not only have the inquiries of the association reached back to tin can manufacture, and even to the production of tin plate, but they have been

[1] "Costs, Merchandising Practices, Advertising and Sales in the Retail Distribution of Clothing," Bureau of Business Research, Northwestern University, 6 vols., Chicago, 1921.

pushed forward to a study of the dietary values of canned foods. Much of this work is clearly more significant to the commercial departments than to the manufacturing departments.

More fundamental is the question of the relative attention to be paid to pure science and to applied science, so called. In a sense the issue here presented is simply one of how deep a furrow these cultivators of knowledge shall plow. That may well be determined by the strength of the draft horses, or, to drop the metaphor, by the extent of the resources available. But from a broader standpoint the issue involved is how to combine or to correlate purely scientific research with industrial research in such a way that the whole effort may yield the most fruitful results. In short, it is a question of how far it is profitable for a trade association to support the pursuit of basic scientific knowledge. Those who find no warrant for such support fail to realize that practical experimentation, when divorced from all contact with pure science, cannot itself make very significant advances.[1] Such contact appears to be indispensable. If, of course, it can in some manner be established without the assumption by the trade association of direct responsibility for the pursuit of purely scientific research, so much the more advantageous will it be for the association. This explains the now quite common practice of trade associations in supporting by fellowships, endowments, and like arrangements, research investigators in the universities and in government departments like the Bureau of Standards and the Bureau of Fisheries. But in some way or other the vital interplay of suggestion and correction between those occupied in purely scientific research and those occupied in the practical quest for improvement in industrial processes and economic goods must be secured. Nowhere has the reciprocal influence of these two spheres of research activity been described more lucidly and more aptly than in a letter

[1] Note, for example, the testimony of J. J. Carty, who, as Vice-President in charge of Research of the American Telephone and Telegraph Company, has for many years headed one of the most extensive and successful organizations of industrial research in the United States. Presidential address before American Institute of Electrical Engineers, Cleveland, June, 1916, reprinted in Annual Report of Smithsonian Institute, 1916, pp. 523–531.

of Dr. M. E. Sadler of the University of Leeds, commenting upon the British report already alluded to dealing with the establishment of a research institute for the Lancashire cotton industry.[1] He wrote:

> "The definite purpose of applied science, its knowledge of industry, its contact with the daily labour of men, give it a vigor which braces the mind of a colleague who is working at more abstract problems, and who therefore may suffer at times from the lassitude and the 'accidie' which occasionally afflict the student and spoil his work. On the other hand, the disinterestedness of the votary of pure science, his imagination free from utilitarian preoccupations and from the pressure of demands from profit-seeking employers, his passion for discovery for its own sake are antiseptic to the poison of commercialism, and excite new thoughts in the minds of those concentrated upon applied science. . . . Applied science derives most of its strength from pure science, pure science a part . . . of its vindication and encouragement from applied. . . . Either isolated from the other is weakened through lack of contact with the characteristic virtues of its opposite."

§3. The Organization of Research Undertakings

No less provocative of issues than the determination of the nature and scope of the research to be undertaken,[2] is the solution of the problem of the type of organization through which the work is to be conducted. The mode of organizing industrial or commercial research may vary all the way from a loose and informal exchange of data and sporadic correspondence and conferences among association

[1] This letter, dated August 15, 1917, is part of a considerable correspondence carried on through the columns of the *Manchester Guardian* following the appearance of the report. It is reprinted with the Report, *op. cit.*, p. 68.

[2] Of the more superficial problem of deciding upon the particular matters to be investigated, once the larger issues sketched above have been resolved, little need be said. In the end it is chiefly a question of the order of work. In each trade there are special problems which at any particular time are in the forefront of attention; but these most perplexing problems do not always represent the most promising lines of investigation. Ordinarily, therefore, it is probably desirable that the judgment of the association members, who are immersed in the distracting details of business routine, should defer to the opinion of a competent director of research, whose recommendations are based upon a studied survey of the entire field. The question, as stated, is essentially a managerial one. Nevertheless, it is exceedingly important that the men in the trade be encouraged to take a lively interest in the work and to maintain close and continuous contact with its progress. All of these considerations, therefore, must generally be taken into account in the selection of the specific lines of inquiry to be pursued.

members, to the conduct of extensive experiments by an independent staff of investigators. In some degree the methods adopted will depend upon the nature of the inquiries being made. For example, an investigation of systems of wage payments must largely rely upon the assembly from members of the accumulated experience of the trade and upon the co-operation of members in making experimental studies under controlled conditions. A problem such as this must necessarily concern itself with the peculiar nature of the work and the special characteristics of the workers in the given industry; it is not susceptible of attack, or at least of being advanced far towards a solution, by laboratory and library methods. If an inquiry were launched into the question of selling efficiency in a given trade, the interchange of information would doubtless have to be supplemented by field work. Among other things, account would have to be taken of the prevailing personal relationships between particular sellers and particular buyers, of the climatic conditions of the various geographical regions sought to be reached, and of the special behavioristic traits and temperamental eccentricities of potential consumers in certain sections of the market. For such an investigation an intensive survey of "sample" territories would be especially appropriate. On the other hand, a determination of the chemical composition or physical properties of a product which will adapt it to more strenuous use or preserve it longer in storage, or in any other way add to its desired characteristics, is a problem suited for independent laboratory research, without the direct or substantial collaboration of the trade associates.

The extent of the resources made available for research also conditions the mode of its organization. If the funds provided are ample, the establishment of a separate bureau or laboratory, with a staff of scientifically trained experts—whether of economists, psychologists, and accountants for commercial research, or of chemists, physicists, and engineers for technical research—is feasible.[1] As a matter of fact, the most extensive organizations for industrial research in this

[1] Prominent among recent instances of trade associations embarking in co-operative research upon a permanent basis and on a large scale are the Institute of American Meat Packers and the American Institute of Baking.

country are not those jointly maintained by trade associations, but those supported by individual concerns—and largely because certain of these concerns, appreciating more fully than the general run of business men the advantages to be derived from industrial pioneering, have provided bountiful resources for this work. Such corporations as the American Telephone and Telegraph Company and the General Electric Company are among the leaders in this type of enterprise.[1] It goes without saying, moreover, that it is the newer branches of industry, which owe their origin and development to relatively recent and revolutionary transformations of industrial technique, that contribute most liberally to the support of research activity, and incidentally find in this policy the most ample rewards.

Should a particular trade not feel in position, however, to enter upon an extensive program, comparable to those just cited, which would ordinarily involve heavy commitments for the future, there are still numerous ways left open for fruitful co-operation in this direction. The Federal Government, through the Department of Commerce, welcomes the opportunity to promote industrial progress through lending the use of the equipment of its technical bureaus to approved scientific investigators maintained by trade associations. For example, arrangements have recently been completed whereby the Portland Cement Association is to furnish the services of six men, three chemists and three engineers, for an investigation to be conducted in co-operation with the staff of the Bureau of Standards, which will cover all phases of cement manufacturing processes and the economic uses of concrete.[2]

Again, there exist several co-operative and semi-co-operative organizations for conducting research in the problems of industry and business which depend upon the support of diverse lines of trade. The National Industrial Conference Board represents this type of organization.[3] It maintains

[1] See J. J. Carty, *op. cit.*, pp. 523–524, and H. E. Howe, *op. cit.*, p. 262. The American Telephone and Telegraph Company is stated to be employing upwards of a thousand men upon problems of research.

[2] See *Journal of Industrial and Engineering Chemistry*, Vol. 16, June, 1924, p. 497.

[3] Other agencies of this type, organized privately but for quasi-public ends, are the Bureau of Industrial Research and the Bureau of Personnel Research.

an extensive staff of specialists in economic and statistical science. Its investigations cover a wide range of subjects in the field of industrial economics, but in order that the results may prove advantageous to the membership of all the diverse trade associations of which it is composed, these investigations are perforce of a broad and general nature.

The facilities of many universities are also available, and many trade associations have established fellowships for research by graduate students in specified industrial problems.[1] In some instances these co-operative arrangements with universities have been more highly developed, as in the case of the Leather Research Bureau established at the University of Cincinnati with the support of the National Tanners' Council. It is hardly necessary to state that under such circumstances a trade association relinquishes its exclusive control over the lines of investigation pursued. The selection of problems and methods, though subject to the suggestions of the trade association, is finally made by the university authorities, and from the nature of the case an individual service dealing with the specific technical and commercial dilemmas of association members is precluded. Olny fundamental scientific questions can be made the subject of research under such auspices. Another instance of nuiversity co-operation with organized industries is afforded by the University of Pittsburgh. Here, by a generous and far-sighted philanthropy, there has been established the Mellon Institute of Industrial Research, for the specific purpose of providing suitable equipment and a favorable environment for research workers supported by trade organizations. According to the most recent report of the Director of the Institute, out of a total of 52 fellowships in force as of February 29, 1924, there were 15 established by trade associations.[2] Similarly, the Bureau of Business Research or-

[1] See Bulletins of the National Research Council, Vol. 7, part 2, No. 38, November, 1923, on "Fellowships and Scholarships for Advanced Work in Science and Technology," particularly pp. 86–87, giving "List of Industrial Corporations and Trade Associations Supporting Fellowships."

[2] The report is reproduced in the *Journal of Industrial and Engineering Chemistry*, Vol. 16, May, 1924, p. 642. Several of the fellowships employ more than one research worker. The trade associations maintaining fellowships are the following: Refractories Manufacturers Association, Magnesia Association of America, Clay Products Association, Eastern Clay Products Association, Mundatechnical Society

ganized at Harvard University in 1911, and the Bureau of Business Research established at Northwestern University in 1919, undertake investigations of commercial policies, practices, and conditions on behalf of trade associations at their request. The Harvard bureau, for example, has for several years performed a regular service in the analysis of cost trends and the study of managerial problems for the American National Retail Jewelers' Association,[1] and for the current year, 1924, it is carrying on similar investigations for eight other trade associations.[2] The Northwestern bureau has completed one of the most comprehensive surveys of trade relationships, methods, and costs ever made in any line of trade for the National Retail Clothiers' Association and with its co-operation. These are but examples of numerous projects of commercial research carried through under the guidance of these institutions, and there are many other universities now so organized as to co-operate with trade associations, chambers of commerce, and like bodies, along similar lines of research. The services of these university bureaus are generally available at cost.[3]

An illustration of a type of research organization which is built upon a closer and more intimate contact with association members than any of the foregoing arrangements is furnished by the American Malleable Castings Association. In 1912, the full-time services of an eminent metallurgical engineer were secured, who made a survey of the plant

of America, Stove Founders' Research Association, Edible Gelatin Manufacturers' Research Society of America, Associated Tile Manufacturers, Laundryowners' National Association, Compressed Gas Manufacturers' Association, National Wood Chemical Association, National Container Association, Institute of American Meat Packers, Rex Research Bureau (insecticides), Sheet Metal Ware Association.

[1] See Report of the Acting Dean, Graduate School of Business Administration, Academic Year 1918–19, in Official Register of Harvard University, Vol. 17, No. 7, p. 98.

[2] National Shoe Retailers' Association, National Retail Grocers' Association, National Wholesale Grocers' Association, National Retail Dry Goods Association, National Wholesale Dry Goods Association, National Wholesale Druggists' Association, Rubber Association of America, Automotive Equipment Association.

[3] See "Round Table Conference on Bureaus of Business Research," *American Economic Review*, Vol. XIII, 1923, pp. 223–236. *Cf.* Also Bulletin of the Bureau of Business Research, Harvard University, May, 1913, No. 1, pp. 3–6, on "Object and History of the Bureau, etc.," and current announcements of Northwestern University, New York University, University of Illinois, and Harvard University. The list of publications of each bureau printed in their various bulletins generally indicates the range of their interests and connections.

equipment and the metallurgical practices employed in the various plants of the members and a chemical and physical analysis of the product of each. This led to the establishment of a permanent laboratory at Albany, New York, to which members are required to send test bars from every "heat." The results of these tests are published monthly, and the causes of any deficiency are analyzed. The achievement of a standard tensile strength and ductility is encouraged by permission to stamp standard products with the "Certified Malleable Castings" seal of the association.[1] Regular individual plant inspections are made by experts of the research staff, so that improvements in processes at any point may be transmitted speedily to the advantage of the entire membership. The net result of this co-operation has been an improvement of the product and an expansion of the industry at a remarkable rate.[2] According to a statement issued by the association in 1924, the average tensile strength of the product of all members has nearly doubled since 1912 and the elongation more than tripled since that time.[3] Other properties of the product have also been improved. This extensive and excellent work in co-operative research has not, moreover, meant the abandonment of individual activity in this direction. Several of the larger members of the association continue to operate their own testing and experimental laboratories, some upon a considerable scale.[4] Evidently the achievements of the association have served to demonstrate to the skeptical the value of technological pioneering, and thus to confirm the faith of those who broke away from tradition in 1912.

In these various ways numerous trade associations have undertaken to build more secure foundations in the business world for the commercial and industrial organizations which they represent. It is impossible to state even approximately

[1] "Malleable Castings," *Iron Age*, July 20, 1922, p. 137.

[2] The production of malleable iron has increased during the last decade by 133 per cent. From a tonnage of 671,771 in 1914, the output expanded to 1,571,064 in 1923. See Statistical Annual, 1922, of American Iron and Steel Institute, New York, 1923, p. 7. The figures for 1923 were furnished by the Institute directly in anticipation of general publication.

[3] *Iron Trade Review*, April 3, 1924, pp. 937–938.

[4] See *Iron Age*, June 29, 1922, p. 1819.

the number of associations now engaged in this type of co-operation or the extent of the resources applied to this end.[1] But that co-operative research activity is rapidly expanding is recognized by every one familiar with the work of trade associations or with current business developments as reflected in the periodical literature of trade and industry.[2] In the light of its significant economic functions and basically constructive character, its continued growth appears to be assured.

[1] An editorial upon "Research Among Trades" in the *Journal of Industrial and Engineering Chemistry* for January, 1923, Vol. 15, p. 3, gives a list of 42 trade associations definitely known to be engaged in research at that time. It is probable that this list includes only those supporting technical research. See also "Trade Association Activities," Department of Commerce, Washington, 1923, p. 174.

[2] See F. D. Jones, "Trade Association Activities and the Law," New York, 1922, pp. 103–105.

CHAPTER XV

EDUCATION IN COST FINDING

§1. Uniform Cost Finding and Artificial Price Control

Less comprehensive in scope and less fundamental in significance than the extension of the boundaries of trade knowledge through research activity, but essentially of the same constructive character, is the development, through associated educational efforts, of methods of measuring quantitatively the various elements of cost involved in the actual processes of producing and distributing goods. It should be noted at the outset, however, that whereas research activity, whether applied to manufacturing technique or to marketing practice, is wholly free from questions of legality, even when it involves investigations of costs of production, the same cannot be said of education in cost finding, which, as it has been occasionally pursued, may tend to concert of action for the future. At least in so far as the development of cost accounting systems, on the initiative or under the auspices of trade associations, encompasses the utilization of actual or constructive cost figures or the interchange of cost data, it may be developed into association activity in the compilation and distribution of statistical information, which we have seen to be subject to judicial scrutiny under the anti-trust laws.

The function of educating the participants in a given branch of industry in the analysis of productive operations and assisting them to shape their policies with due regard to the whole complex of forces bearing upon economy and waste in the establishment is comparable, manifestly, to the function of educating those same participants in the analysis of market conditions and assisting them to shape their policies with due regard to the forces bearing upon supply and demand. If, in either case, the necessary intent or probable effect of this co-operative activity is to produce harmony of

action and thereby affect prices arbitrarily, the activity of the associates is likely to encounter legal condemnation. The circumstances under which such abuse might arise in connection with the discussion of price manipulation and the collection and dissemination of trade statistics have been examined. But whereas the educational efforts of trade associations to build up a better knowledge of market conditions have, in practice, centered very largely, and perhaps necessarily, in the development of an adequate basis of business information through interchange of statistical data, in their efforts to induce a better understanding of costs this aspect of the educational program has actually occupied a secondary place. Cost keeping, as such, may be effectively stimulated without resort to the collection and dissemination of cost figures among competitors. There are manifest advantages of cost accounting which in no way depend upon the joint use of the results obtained from the accounts in competing plants. The essential function of education in cost finding is to induce a more intelligent control of the productive operations in each independent establishment, and it is an entirely collateral consideration if this work be extended to promote a common knowledge by every trade firm of the internal affairs of each of its rivals. As commonly pursued by trade associations, the cultivation of wide and more accurate knowledge concerning the costs actually incurred in manufacturing processes depends primarily upon instruction in the principles of cost accounting and upon a demonstration of the ease and advantage of installing and operating suitable systems of cost accounts. This, essentially, is education in cost finding, and it is obviously free from those intricate questions of legality which spring from agreement or understanding upon specific elements of cost or which surround the collection and dissemination of cost data, as of other trade statistics. It is only to the educational and constructive cost accounting activities of trade associations that attention will here be directed.

§2. The Problem of Cost Determination

Prior to the development of the machine technology and the factory system upon a large scale, the manufacturer in

most lines of trade could without difficulty ascertain the cost of production of his goods by the simple device of maintaining a record of his actual money outlays upon any job. There was no need for careful differentiation between interest, overhead charges, wages of management, and profits. So restricted was the part in production played by capital, in the form of tools, and so slight was the division of functions, that whatever was obtained by a manufacturer above his direct outlays in cash was for the most part his personal income. This lump differential, which consisted largely of wages to himself (although it also included elements of interest, rent and profits), came to be stereotyped under competitive conditions, and together with direct money outlays, reflected total cost in terms of selling price. With the advent of modern industrialism, however, radical changes have been brought about, both in the size of the factors involved in any computation of production costs, and in their relative proportion and significance. In the first place, capital has to a very large extent been substituted for labor in most productive processes. As a result, an increasingly larger proportion of the total cost of producing most goods has come to be represented by factors which receive no direct and immediate compensation, at least as applied to specific units of the goods produced. While wages, of course, are currently paid, even these payments merely represent expenditures incurred in connection with particular operations in an extensive productive process. But the payment of interest, at least in so far as the investment is not represented by credit instruments, may be indefinitely deferred; and as for depreciation of capital equipment, although the processes of physical deterioration and of obsolescence are continuously operative, the current outlays are intermittent. Moreover, the burdens of interest and depreciation, even when actual expenditures are finally made, are not directly applicable to the specific goods whose costs are subject to inquiry. Accordingly, a continually declining percentage of total cost is represented by current money outlays.

Secondly, the larger scale of operations prevailing in the modern industrial system, with its minute division of labor, has necessitated the devotion of an increasingly greater

amount of attention to planning, supervision, and inspection. The marshalling of the various elements involved in the operation of even a single productive unit nowadays requires foresight, courage, and executive capacity; but these qualities would be of no avail, were they not supplemented by elaborate systems of control, necessitating the employment of expensive mechanical devices and an army of subordinate officials throughout the many ramifications of these far-flung business enterprises. Administrative expenses, therefore, have mounted cumulatively with the growth of the scale of business operations; they have become a steadily more important element in costs of production. But expenses of this character cannot be directly allocated to specific jobs or portions of output. They represent general "overhead."

Chiefly because of these characteristics of the prevailing industrial mechanism, the ascertainment of the unit costs of most types of goods has become a very complicated problem. Even at best such costs can be determined only with approximate accuracy. But in the absence of fairly precise knowledge of costs, it is manifest that some of the basic data essential to the progressive development of efficiency in production are lacking, and that the market policies of producers are prone to be wayward and unstable. Under such circumstances it is difficult, if not impossible, to locate hidden wastes and introduce potential economies, and commodity markets become subject to disturbance and even to disruption—with consequences, in the long run, no less harmful to the consuming public and to the competitive process than they are disastrous to the unfortunate producers who carry on thus blindly. It is quite natural, therefore, that trade associations, which represent generally at least the average level of the industry with respect to the intelligence of the control exercised over manufacturing processes and marketing policies, should include in their constructive program co-operative efforts to educate the entire membership in a better comprehension of their costs of doing business. Even when the majority of those in a given branch of industry are operating in ignorance of actual unit costs, as is not infre-

quently the case,[1] the trade association affords the most promising medium through which the more progressive leaders may initiate improvement in this direction. The largest number of those who have failed to appreciate and practice scientific cost finding will generally be found among the relatively small producers whose scant experience and limited resources deter them from experimenting in ways that do not lead directly and clearly to pecuniary returns. But experimentation is essential to the development of effective cost systems; they cannot be improvised out of hand, because they must necessarily be moulded by the peculiar conditions surrounding the particular industry and even the specific enterprise. The formulation of workable plans, therefore, is best accomplished through expert study of the common characteristics of the majority of plants in the industry, and the issuance of general instructions on the installation and operation of the standard system so derived—the result, of course, being subject to such modification as the special circumstances of the particular enterprise may require. This procedure places at the disposal of small firms the fruit of the experience of the larger concerns, as well as the costly expert assistance which they may be unable, individually, to command.

§3. The Character and Extent of Education in Cost Finding

It has come about, therefore, that a great many trade associations have engaged in educational work designed to stimulate the adoption of accurate cost finding systems.[2] The simplest service rendered by these associations consists in explaining the general principles of cost accounting and

[1] The Federal Trade Commission, as a result of its experience in making investigations over a wide range of industries, wrote as follows in 1916: "The Commission's investigations showed that a large percentage of the merchants and manufacturers of the country, particularly the smaller ones, had very inadequate knowledge either of their costs of production or of their selling expenses. Many of them kept their books in such a way that they were unable to supply the commission with even the simplest facts concerning their business." Annual Report for Fiscal Year Ended June 30, 1916, p. 15. See also "Fundamentals of a Cost System for Manufacturers," Federal Trade Commission, July 1, 1916.

[2] The Secretary of the National Association of Cost Accountants reported in September, 1923, that there were 121 trade associations of which his office had recorded the adoption of a uniform system of cost accounts. Yearbook, 1923, p. 297.

describing the numerous methods of cost analysis which have been worked out in various industries. This instruction is usually accompanied by efforts to persuade the associates to adopt the general policy of recording and analyzing their costs of production, the advantages derivable from cost keeping within the individual establishment being fully pointed out and repeatedly emphasized by those responsible for the prosecution of this association activity.[1] A more elaborate educational program, growing out of these initial efforts, involves the drafting of a complete and detailed plan for cost accounting suitable to the industry, with recommendations for its adoption in all plants and establishments within the field of the association's jurisdiction. It is usually found that the preparation of such a concrete and clearly described system-outline is by far the most effective means of progress along the educational pathway first worked out.[2]

Generally, therefore, education in cost finding has eventuated in the submission and endorsement of a standard cost accounting system for the trade.[3] This does not mean, however, that every uniform system which has been adopted has been universally put into effect by the association membership nor that immediate universal adoption is essential to the success of this activity. The American Face Brick Association, for example, reported in 1922 that only 15 out of its 110 members had installed complete cost accounting systems based upon the association's plan.[4] In that year a revision of the Association's system was made and the educational campaign for its adoption continued. As a result,

[1] For an example of how the cost work of an association develops, see Report of Proceedings of Twenty-Third Annual Convention of National Association of Ice Cream Manufacturers, 1923, pp. 79–83.

[2] Compare, for example, the experience in the silk industry. See "The Silkworm," Bulletin of the Silk Association of America, February, 1924, p. 424.

[3] Not infrequently the association also prints the necessary forms and offers to supply them to members at cost. Among the various associations providing this service may be mentioned the Association of Electragists and the News Print Service Bureau.

[4] See "National Trade Associations," National Association of Manufacturers, New York, 1922, p. 46. Several other trade associations in the same survey reported unencouraging results. The Leather Belting Exchange stated that about one-fourth of its members had put in use the standard system adopted by the association. *Ibid.*, p. 137. The plan of the Associated Wooden Ware Manufacturers was in complete operation in the plants of only two of its 23 members, and in partial operation in a third plant. *Ibid.*, p. 245.

in spite of a diversity in accounting methods necessarily arising from the fact that a large number of brick producers also manufacture other clay products, the membership is reported to have evinced a growing interest in cost finding. In numerous instances, where this system was not found suitable for unmodified adoption, members have installed individual cost systems which conform in essential respects to the association standards. This experience is by no means exceptional. It is important to note, moreover, that the adoption of a uniform system of cost accounting is essentially free from the implication that the associates interchange cost data[1] or that they agree, expressly or tacitly, upon common or arbitrary figures for any item of expense. While the latter activity, at least, appears to border upon the proscribed field of business co-operation, it is restricted to a very few associations. According to the recent testimony of a well-informed public accountant, there are not "more than ten or twelve trade associations that are actually exchanging cost data."[2] When it is recalled that some 125 associations are reported to have adopted uniform systems of cost accounting, it becomes obvious that it is only to a very minor extent that the accounting aspect of trade association activity touches upon the fringe of legal issues under the anti-trust laws. Moreover, in so far as such activity is deemed to run counter to the dictates of public policy, it is clearly no part of a genuinely educational program in cost finding.

There are fundamental obstacles to the general adoption within each trade of a uniform system of cost accounting, although they do not offset the educational advantages to be derived from providing a concrete plan as a basis for the development of adequate cost finding machinery by the several establishments in the industry. The variations in the size of plants or establishments introduce complications, in many instances, which extend beyond the mere number or frequency of accounting operations necessary to record the essential facts. The larger the organization the greater, as

[1] Though this of itself appears not to be within the prohibitions of the Sherman Act. See *Maple Flooring Association v. U. S.* Supreme Court, October Term, 1924, Docket No. 342. Decided June 1, 1925.

[2] C. R. Stevenson, "The Future of Trade Association Cost Work," National Association of Cost Accountants, Year Book, 1923, p. 298.

a rule, is the variety of the standard record forms required, and the more elaborate is the system of checking and comparison of data necessary to gain the desired results. Moreover, the frequent absence of sharp dividing lines between industries creates a similar but more serious difficulty. A commodity may be a minor product, or essentially a by-product, for some producers,—as, for example, oleomargarine from packing houses,—but the main type of output for others. The difficulties resulting from diversified production activity are illustrated by the statement of the National Association of Baby Vehicle Manufacturers that "75 per cent of the membership are manufacturing articles other than baby vehicles, and it has not yet been possible to find a uniform method of figuring costs applicable equally" to the varying conditions under which the principal commodity is produced.[1] Furthermore, as in the automobile industry, some manufacturers may be merely assemblers of semi-finished products, while others may cover substantially the entire productive process, from the conversion of the raw material to the distribution of the completed output among ultimate consumers; or, as in the glass bottle industry, the same product may be manufactured by totally dissimilar methods. Distinctive problems of this character account for the report of the National Lumber Manufacturers' Association that "because of the widely diversified methods of logging and manufacturing it is practically impossible to adopt a uniform cost accounting system that would be applicable for the various lumber producing regions as a whole,"[2] and for the conclusion of the Associated Cooperage Industries that "the matter of working out a standard system presents unusual difficulties because of the dissimilarity of the operations in the different branches of the industry."[3] Where obstacles of this nature are very pronounced, therefore, a trade association may be confined to the purely instructional work of explaining the general principles and advantages of cost finding to its members.

But whatever the educational methods pursued, a trade association which undertakes to induce among its members

[1] "National Trade Associations," *op. cit.*, p. 104.

[2] *Ibid.*, pp. 148–149.

[3] *Ibid.*, p. 73.

a better and fuller understanding of their several costs of production is infusing into the conduct of business an element of knowledge calculated to stimulate efficient production and orderly distribution. Such co-operative activity exemplifies the prudential and constructive aspect of the trade association movement. Education in cost finding represents a program of "setting-up exercises" for keeping the business organism in health and for enabling it to grow.

CHAPTER XVI

STIMULATION OF DEMAND

§1. The Essential Character of the Advertising Function

In the evolution of the modern industrial structure there has been a marked and significant tendency for business transactions and economic contacts to become increasingly impersonal. The nature of employer-employee relationships, for example, has been so transformed, and the difficulties of their adjustment have been so multiplied, that grave misgivings are sometimes expressed regarding the stability of the current economic order. The types of relationships between investors and managers have been so altered and their complexity so increased, that over-capitalization, financial manipulation, and fraudulent stock-jobbing have created a pressing problem. The quality of producer-consumer relationships has been so revolutionized and their range so widened, that cyclical industrial maladjustments have come to constitute almost a normal accompaniment of current productive activity. In whatever aspect one views the current economic process, one discovers that the problems which challenge attention involve, whatever their dominant causes may be, a separation of the essential parties in interest. The bonds of fellowship and of community of purpose which spring from personal relations and direct dealings have been conspicuously weakened. However closely allied, if not identical, the interests of the parties in these various relationships may be ultimately, they stand in the conduct of everyday affairs not only apart, but at a distance.

The efforts to bridge these gaps make up a large part of the struggles and experiments which vivify modern industrial experience. The process of advertising and the organization of statistical services represent definite movements upon a

considerable scale to correct or to counteract the maladjustments flowing from the separation of producers and consumers. In the law, the extension of the liability of vendors, the enforcement of certification of quality, and the establishment of minimum standards of wholesomeness or of safety, with respect to an increasing range of products, exemplify the general unwillingness to leave the proper adjustment of the producer-consumer relationship to the unregulated forces operating in the market. And the frequent agitation for various modifications of the prevailing régime, whereby it is proposed to substitute some scheme of socialized production for the existing competitive mechanism, illustrates the same type of reaction, only in more violent degree, to the evils attending the divorce of producer and consumer interests which characterizes the modern organization of industry.

If advertising, despite its many undesirable features, be recognized as an educational enterprise for bringing producers and consumers nearer together—for achieving a close adjustment between their activities—its significance in the program of trade association work becomes apparent. Advertising is essentially a device for overcoming the strains and stresses which rack an industrial society operating on a machine technology under a control system based on private property and the division of economic interests. It represents an effort to accomplish, by voluntary means, the correlation of productive and consumptive processes which is at once so indispensable and so difficult to manage under modern conditions. While more authoritative measures, both public and private, are in some quarters believed to be necessary to achieve this end effectively, the control of demand through advertising, as thus conceived, clearly falls within the normal compass of trade association activity. Its basic import is but a specific expression of the general purpose of the trade association movement. Both are in the nature of "rescue missions"—designed to save established industrial habits and usages from the "demoralization" which frequently emerges in the functioning of the current economic order. The advertising function, like the movement as a whole, therefore, possesses a permanent institutional character which extends beyond the mere attainment

of immediate business ends. It is true, of course, that advertising as a means of informing and directing the demand for goods may be employed by competitive business concerns for purely private advantage, and that it has traditionally been so employed. But even when it is thus exploited it serves, however imperfectly, the larger function, if not of stabilizing the market, at least of expediting the expression of maximum effective demand. It tends, thus, to promote a better adjustment of production and consumption. It tends to make the actual demand of consumers correspond more closely to their potential demand. But as conducted by trade associations, on a co-operative basis, it is manifest that advertising is calculated to play this rôle much more effectively. Instead of its major force being spent in the diversion, or in resistance to diversion, of the consumer demand from one source of supply of a product to another, the thrust of the "campaign," under usual circumstances, is directed wholly to the advancement of the industry and the protection of its market. While the money spent in joint advertising, therefore, may not yield as high immediate returns to the individual contributors as the funds devoted to competitive advertising by the same business units, the permanent welfare of the industry—as evidenced by the persistence of the demand for its products, the evenness of capital inflow, the regularity of its operations, and like factors—is far more effectively promoted thereby. These considerations have led numerous trade associations to embark upon various types of co-operative advertising ventures.

§2. The Principal Avenues for Joint Publicity Undertakings

Perhaps the most conspicuous instances of successful joint advertising campaigns are to be found among those industries in which small-scale production is the general rule, but which reach out into extensive markets. The various fruit-growing industries provide well-known examples. Raisins, oranges, canteloupes, apples, and the like, are not economically producible by individual enterprises upon a very large scale, but they are collected and distributed through-

out a national market. Under these circumstances, individual producers cannot afford to advertise in the national market in which their products are sold. A similar situation confronts dairies. Their production is of comparatively small volume, usually, even in relation to the single metropolitan market in which their products are sold. To a less degree, but in some measure, a manufacturing industry like the knitted outerwear trade is likewise of this type. It has been estimated that of about 1,200 manufacturers in this industry in the United States only six have been regular national advertisers to the consumer.[1] By organizing co-operative publicity campaigns the associations in these various fields have been enabled to solidify and extend the market for their products without imposing an inequitable or unbearable burden upon the individual producer. Latent wants for oranges and raisins have been translated into an effective market demand.[2] The nutritive value and economy of milk as an element in the regular diet have been explained so repeatedly, that the adult population no longer considers it as peculiarly an infant food.[3] The advantages of sweaters over other garments for many occasions have been stressed to such an extent that they are widely recognized as an almost indispensable article of wearing apparel.[4]

New industries constitute a second class of undertakings which have found in joint publicity work a fruitful sphere of action. The National Slag Association, for example, has sought to make more widely known the uses of blast furnace slag as a building material for the construction industry and road-making.[5] Another illustration is furnished by the national advertising campaign of the Davenport Bed Section of the National Association of Upholstered Furniture Manufacturers, which was supplemented by dealer advertising

[1] *Printers' Ink*, Feb. 24, 1921, p. 65.

[2] The California Fruit Growers' Exchange, the Florida Citrus Exchange, and the Sun-Maid Raisin Growers are extensive national advertisers. See "National Markets and National Advertising," Crowell Publishing Co., Philadelphia, 1923, p. 189.

[3] The Holstein-Friesian Association of America and the Dairymen's League Co-operative Association have supplemented in a national way the limited publicity programs of numerous local organizations of milk producers. *Ibid.*, p. 189.

[4] *Printers' Ink*, Feb. 24, 1921, p. 65.

[5] See *Engineering World*, June 15, 1919.

through the trade press.[1] The Plywood Manufacturers' Association has also engaged in considerable advertising activity, as a means of opening up new fields for their comparatively unknown product.[2] New industries find this form of co-operation particularly advantageous for two principal reasons: first, they tend to partake of the characteristics of the first group of industries mentioned, and hence attract many venturesome enterprisers who operate, at least at the outset, on a relatively restricted scale but for a relatively diffused market; and, second, new industries, because of the very fact that their products are unknown, find fruitful opportunities in co-operative publicity.

A third class of industries which have found in joint advertising a valuable and practicable function for their trade associations consists of those manufacturing familiar goods of well-known qualities, the market for which has been invaded by alternative products. Frequently, though not necessarily, these alternative products are newly developed articles of commerce which may permanently share in the demand for the given class of goods, but the novelty of which may, at least for a time, attract an unmerited custom. Co-operative publicity is designed to minimize, if not to prevent, this defection of trade. A noteworthy example of joint advertising directed to this end is afforded by the campaign of the American Sole and Belting Leather Tanners.[3] Rubber soles and rubber belting were making serious inroads upon heavy leathers. Similar circumstances have led to co-operative action in various branches of the lumber industry. Metals and clay products have come to be used very extensively in certain fields, particularly that of building construction, which had formerly been reserved almost exclusively to lumber and wood products.[4] This loss of trade has

[1] *Printers' Ink*, April 19, 1923, p. 61.

[2] "National Trade Associations," National Association of Manufacturers, New York, 1922, pp. 107–108. The many new uses which have been developed for zinc in late years account in large part for the undertaking of an extensive joint advertising campaign in that industry. See Bulletin of American Zinc Institute, May, 1923, p. 75.

[3] The association has undertaken to spend $1,000,000 in a three-year advertising campaign. *Printers' Ink*, May 10, 1923.

[4] See "The Substitution of Other Materials for Wood," Report No. 117, Department of Agriculture, Washington, 1915.

been checked somewhat through resort to co-operative national advertising by such organizations as the National Lumber Manufacturers' Association, the Southern Pine Association, the American Walnut Manufacturers' Association, the Mahogany Association, Inc., and the Southern Cypress Manufacturers' Association.[1] Even sauerkraut has had an advertising fund assembled for its defense—that its erstwhile consumers may be reminded of its succulent savor and recalled from the vain pursuit of fresh vegetables.[2]

A final general group of industries which have resorted to co-operative advertising is made up of those which have occasion to counteract popular prejudice or propaganda against their products. The best known of the trades in this position is the coffee trade. The Joint Coffee Trade Publicity Committee, representing the Brazilian planters, the Green Coffee Merchants of America, and the National Coffee Roasters' Association, has conducted an extensive campaign over the last five years to combat consumer prejudices.[3] The Associated Knit Underwear Manufacturers of America have likewise spent considerable sums in explaining the merits of their products.[4] Similarly, the Institute of Margarin Manufacturers has from time to time issued bulletins upon the food value of their product. These illustrations might be multiplied. It is evident that wherever buying impulses are inhibited by unreasoning prejudices or by social interdictions of varying degrees of stringency, it is possible to accomplish much in the way of trade extension by militant publicity. Since the purpose of such publicity is to overcome obstacles in the market which affect the sale of all of the given type of goods, and not simply the output of the individual

[1] See Report of National Lumber Manufacturers' Association, Twenty-First Annual Meeting, Washington, 1923, p. 15. The Southern Cypress Manufacturers' Association has advertised steadily since 1912. For a list of other lumber associations thus engaged, see "National Markets and National Advertising," *op. cit.*, p. 189.

[2] The organization in the trade is known as the National Kraut Packers' Association. See "National Markets and National Advertising," *op. cit., p.* 189.

[3] See Felix Coste, "Guide Posts for Co-operative Advertising Campaigns," *Printers' Ink*, June 19, 1924, p. 158 *et seq.*

[4] L. U. Lynt, "The Progress of the Knitted Underwear Co-operative Advertising Campaign," *Printers' Ink*, January 25, 1923, p. 144.

producer, there is ample warrant for advertising of this character to be co-operatively supported in the trade.[1]

§3. The Methods of Joint Publicity

The methods through which the advertising activities of trade associations may be carried on are no less varied than those available to individual concerns. Indeed, these organizations may often employ some mediums more effectively than single business enterprises. For example, fairs and exhibitions to which the public is invited are invariably more popular in their appeal, the wider the representation of the various factors in the trade.[2] Motion pictures and the radio stand in a similar position.[3] But the toleration of advertising through channels such as these, which impose more or less involuntary attention upon the public, has its limits. Some associations have adopted a common trade-mark to identify the products of their members.[4] And agreement upon a common slogan, both for individual use of the associates and for co-operative publicity, has become rather general. Several of these slogans have been made part of the common parlance of men in the street—for example, "Say it with flowers," "Save the surface and you save all," "Cypress, the Wood Eternal." Through pamphlets, demonstrations,

[1] It should be noted that there are some branches of trade in which little opportunity exists for joint efforts to stimulate demand. The American Specialty Manufacturers' Association, for example, on account of the wide variety of products made by its members, would find difficulty in formulating a feasible program for co-operative advertising. Similarly, the Automobile Accessory Manufacturers' Association and the National Wholesale Grocers' Association find more attractive opportunities for business co-operation in other channels.

[2] Annual "shows" are held by the National Automobile Chamber of Commerce, the Toy Fair Chamber of Commerce, the Silk Association of America, and the several national furniture associations. In numerous trades the annual conventions of retailers' associations, both state and national, are made the occasions of exhibitions, often quite elaborate, by manufacturers and wholesalers.

[3] Films have been produced and issued by numerous associations, depicting the history of a given branch of industry and describing the successive processes of current manufacturing practice. Among others which have used this channel of publicity are the Refractories Manufacturers' Association, the National Electric Light Association, and the American Face Brick Association. The radio is also beginning to come into use. See Annual Report of the Silk Association of America, New York, 1923, p. 42.

[4] Among the associations which have adopted common trade-marks are the National Warm Air Heating and Ventilating Association, the California Fruit Growers' Exchange, and the Common Brick Manufacturers' Association. See Franklin D. Jones, "Trade Association Activities and the Law," New York, 1922, p. 155.

and similar methods, instruction is also afforded in the proper use of the products of an industry, or in the variety of uses to which these products may be put.[1] But the most common method of procedure in trade association advertising assumes the form of a direct appeal to consumers through the public press, current periodicals, and bill-boards.[2] The Southern Pine Association, the California Fruit Growers' Exchange, the Florida Citrus Exchange, the Copper and Brass Research Association, the Plate Glass Manufacturers of America, the Cast Iron Pipe Publicity Bureau, the National Electric Light Association, the National Jewelers' Publicity Association, the Wall Paper Manufacturers' Association, the Portland Cement Association, and the National Paint, Oil, and Varnish Association are prominent among a group of 68 associations reported to be advertising their industries through periodicals with a national circulation.[3]

But perhaps the clearest picture of the varied channels and methods employed by trade associations in the field of co-operative publicity may be given by noting briefly the character of the efforts of one of the active associations in the lumber industry. The Southern Pine Association, according to the tenor of the most recent report of its Advertising Committee, has developed this service in many directions.[4] It has distributed calendars and display cards among lumber dealers, and has supplied newspaper advertising cuts and mats for their local use. Advertisements have been inserted in a large number of national periodicals. More than twenty-five different books and booklets have been published, dealing chiefly with the advantages of wood in building construction, and upwards of half a million copies of these are distributed

[1] The Brake Lining Association, for example, has centered its campaign around the education of garage men, and has published a booklet upon the best method of inspecting and adjusting automobile brakes. See *Printers' Ink*, Aug. 2, 1923, p. 36. The citrus fruit growers, the raisin growers, and the sauerkraut packers have all published recipe books through their respective associations.

[2] A somewhat unique example of direct advertising is afforded by the Association of Pacific Fisheries. This association, recognizing the opportunity of stressing self-help to a dependent branch of the trade, distributed circular advertising to the employees of tin plate manufacturers and tin can makers. See *Printers' Ink*, June 30, 1921, pp. 106–108.

[3] See "National Markets and National Advertising," *op. cit.*, p. 189.

[4] Report of the Advertising Committee to the Board of Directors, Southern Pine Association, New Orleans, March 10, 1924.

annually to the public, to dealers, to contractors, and to architects.[1] Technical experts are employed to lecture upon better home building and to answer inquiries with regard to the proper use of southern pine in building construction. A motion picture film, "From Log to Lumber," is loaned for exhibition at home-builders' expositions and lumber dealers' conventions. Newspapers have been encouraged to establish special departments devoted to discussion of home building, and have been furnished pertinent copy. Exhibits are given at some of the state fairs, and material is loaned to retail lumber dealers for exhibition at county fairs. All of these activities have been directed primarily toward maintaining and enlarging the market for the products of the southern or yellow pine industry.

§4. The Financing of Co-operative Advertising

One of the chief problems which confronts a trade association in undertaking co-operative publicity grows out of the difficulties encountered in assembling the requisite funds. An association advertising policy, from its very nature, must be of general character and industry-wide scope.[2] Its purpose is not to deflect the consumer demand in any given field from one producer to another, but to shift a portion of the purchasing power of the community from one avenue of consumption to another. If, therefore, joint advertising operates to stimulate the demand for a given product or service, the entire industry is benefited thereby. There is no way of apportioning the fruits of such activity, as between members and non-members, or even among the members themselves, according to their respective contributions to its support or on any other basis. Accordingly, associations which embark upon trade advertising do not usually attempt to provide for its support by a system of equitable assess-

[1] Among these publications are the following: "Modern Homes," "How to Plan, Finance and Build Your Home," "Southern Pine Garages and How to Build Them," "Architectural Uses for Wood" (a series of nine pamphlets), "Southern Pine Manual of Standard Wood Construction" (for the use of architects and others).

[2] Attempts are sometimes made, but usually with limited success, to secure the advantages of joint advertising directly and exclusively to association members. The International Baby Chick Association, for example, emphasizes through its advertising the protection afforded buyers by its Code of Ethics, and assures buyers dealing with its members that they will receive full value. See *Printers' Ink*, March 1, 1923, p. 145.

ment—on the basis of gross sales or some other index of accrued advantage. Because competitive feeling often runs high, and because certain enterprises are buoyed up by a sense of security born of a well established position in the trade, some association members, even if the industry were well-nigh completely organized, would almost invariably be alienated by such a coercive policy. The only alternative is to place the project on a voluntary co-operative basis, the machinery and prestige of the association being utilized to enlist the donations of all, whether members or non-members, who are calculated to enjoy the benefits of the joint publicity undertaking.[1] This is not a solution of the difficulty, however, but only a makeshift. The individual producer who subscribes liberally is none too pleased to see a competitor who has not borne his just share of the expense reap fruits equal to or greater than his own. Hence there are frequent outcroppings of jealousy and mistrust, even after a publicity program has gotten under way, which often lead to its untimely abandonment.[2] The majority of the failures in this type of association activity are traceable to this source rather than to dissatisfaction with the objective results attained.

It appears, then, that co-operative publicity, as conducted by trade associations, is essentially a device for tying together production and consumption—for improving the co-ordination of the productive program of industry with the consumptive budget of society. At bottom it is a means of reducing maladjustments and forestalling dislocations within the competitive economic order. It is doubtless responsible, in some measure, for the maintenance of outgrown tastes and for the creation of artificial wants. To this extent it may itself constitute a source of misdirected effort. On the whole, however, it forms an integral part of legitimate trade association activity. It tends to promote the beneficial ends of the trade association movement as a whole—to rationalize the free functioning of competitive forces through constructive co-operation.

[1] Cf. the description of how the funds of the Joint Coffee Trade Publicity Committee are collected, Felix Coste, "Guide Posts for Co-operative Advertising Campaigns," *Printers' Ink*, June 19, 1924, p. 158.

[2] E. B. Weiss, "Is Association Advertising a Failure?" *Printers' Ink*, August 16, 1923, pp. 125–133.

CHAPTER XVII

CO-OPERATIVE INSURANCE ARRANGEMENTS

§1. The Significance of Insurance Protection in the Competitive Process

It is a trite saying that economic enterprise in all its branches and all its manifold forms is surrounded with risks. Even apart from the financial risks which spring from the character of the capital structure of a business undertaking, and apart from the business risks which spring from fluctuations in the demand for its product or service in sharply alternating periods of prosperity and depression, economic enterprise is subject to extraordinary losses resulting from fire, explosion, theft, defalcation, railroad accidents, shipping disasters, industrial casualties, and numerous other contingencies which cannot be foreseen. No less than in the days when trade was carried on by caravan expeditions into strange lands inhabited by "outlandish" tribes is it true today that the conduct of a commercial or industrial undertaking is "a great adventure." There are almost innumerable contingencies affecting every business concern in every line of trade, the happening of which may wreck the most prudently formulated plans and the most promising prospects. Many of these contingencies cannot be either evaded or predicted. But though in many instances it may be altogether uncertain as to when and where the contingency will occur, and though the aggregate havoc wrought may be reducible only within narrow limits, it is possible, through the process of insurance, to abate the ruinous consequences which might otherwise be visited upon the particular concerns or individuals who have the misfortune of being the victims of the contingency. The application of the principle of insurance to any contingency simply provides an opportunity to all those subject to the risk, and in the degree that each desires to be indemnified against the damage its occur-

rence may work, to pool their risks and distribute the burden of the losses sustained over the entire group in the proportion of their respective rights of indemnification. In this way, while the plans of the participants actually suffering the losses insured against may be seriously subverted and their business prospects substantially altered, the concerns themselves may well escape being wrecked.

All this is familiar economic doctrine. It is recounted here only that it may serve to clarify the significance of the insurance function as a trade association activity. While the principles involved are not new, their import under the competitive organization of industry is only latterly coming to be appreciated in full measure. Essentially, from the standpoint of industrial control, the effect of insurance is this: that from the factors determining the outcome of the struggle for survival among rival business enterprises there tends to be eliminated the pressure of fortuitous circumstance. Insurance protection operates to increase the influence in the achievement of success in trade competition of the conditions within the control of the several competitors, and to diminish the influence of the conditions beyond their control. Greater weight comes to be attached to administrative efficiency and business sagacity; less depends upon mere chance. The promotion by a trade association, therefore, of insurance protection, whether by one means or another, within the confines of its jurisdiction, is manifestly calculated to foster that free competition which public policy relies upon to serve as a modified "process of natural selection" in the economic sphere. The pursuit of this activity helps to stamp a trade association as a legitimate grouping of business interests for mutual protection. It is obviously free of any intent to restrict the operation of competitive forces among the associates.

§2. The Principal Avenues of Co-operative Insurance Service

The avenues through which an association may proceed in developing this function may be roughly classified into three divisions. First, in the order of simplicity of the service rendered and extent of responsibility attaching thereto, is

the education of members in the necessity of protection against unforeseeable contingencies through the medium of insurance, including efforts to minimize the hazards covered by insurance. Second, in this order, is the negotiation with insurance companies of premium rates and other features of the insurance contract, which not infrequently involves, also, some pressure upon association members toward the leveling of risks. Finally, by way of actual assumption of the insurance function, there is the funding of the risks within the trade or the association through the operation of some one of the several devices for mutual insurance. Intermittently and incidentally, the committee or agency set up by a trade association for the prosecution of any or all of these activities may also undertake to deal with matters not covered by this classification. For example, upon occasion efforts may be made to influence legislation relating to state control of insurance companies, or the conditions under which reciprocal insurance arrangements may be effected, or like matters of general concern.[1] But such undertakings are usually collateral to the main lines of effort indicated above—that is, they do not normally constitute part of the regular program of association work. The nature and extent of the principal insurance activities, as characterized above, may now be more fully elaborated.

(*a*) *Spread of Education*

The education of members in insurance principles and practice involves several varieties of service. There is, first, the very general function of explaining and urging the advantages of complete insurance protection for all insurable risks. In the case of such contingencies as fire and industrial accidents, there is usually little need for this broad type of educational work. But there are numerous other insurable risks which are not in general so well understood and provided against. Theft insurance, defalcation insur-

[1] The Insurance Department of such an organization as the United States Chamber of Commerce is precluded by its very nature from negotiating premiums for its members or operating an insurance exchange. Consequently, a main branch of its activity, along with the dissemination of the gospel and literature of insurance, is the organization of pressure upon legislatures to bring about the enactment of desired insurance legislation. See Annual Report of United States Chamber of Commerce, 1920, p. 39; 1922, p. 36; 1923, p. 39.

ance, transit insurance, explosion insurance, and group insurance of personnel are representative of many policies designed for business protection the significance and value of which are not so widely appreciated.[1] The extension of the use of the less common forms of insurance tends to reduce the rate of "business casualty"—that is, the crippling of business enterprises through the burdens imposed by unforeseen contingencies—and so, indirectly, of actual "business mortality," to the general benefit of all engaged in the trade. In addition to performing this broad function of fundamental instruction, a trade association insurance bureau may render more specific service to individual members by assisting in the drafting of policies, by advising upon the fairness of rates and the soundness of particular insurers, and by representing members who have suffered loss in the adjustment of their claims.[2] These are perhaps the most common activities of an insurance bureau, and it is in their discerning and effective performance that the most direct and immediate *quid pro quo* is yielded to association members.[3] In the long run, however, probably the most

[1] See, for example, an instructive report made by the Committee on Insurance to the American Drug Manufacturers' Association in 1921. Tenth Annual Report, 1921, pp. 32–43.

[2] Cf. "Report of Insurance Advisers" in Annual Report of National Association of Farm Equipment Manufacturers, 1921, pp. 168–169.

[3] From the study of "National Trade Associations" published by the National Association of Manufacturers, New York, 1922, it appears that seven of the one hundred odd associations covered by the report had insurance committees or departments advising their members upon specific insurance problems. These associations were the following: Refractories Manufacturers' Association, Associated General Contractors of America, American Cotton Manufacturers' Association, American Walnut Manufacturers' Association, Northern Hemlock and Hardwood Manufacturers' Association, Southern Pine Association, and Silk Association of America. Direct correspondence with the American Walnut Manufacturers' Association and with the Southern Pine Association indicates, however, that these services have been discontinued by these two associations. This fact but exemplifies the insecure basis upon which all statements of the extent of any particular trade association activity at any given time must necessarily stand. In any case the group of associations covered by the report of the National Association of Manufacturers represents only a sample of the American trade association movement. It may be of interest to state that in the progress of the present investigation it has been verified that 26 associations are currently rendering advisory service in insurance matters to their members. Prominent among the associations so engaged but not mentioned above are the following: Gas Products Association, National Wholesale Druggists' Association, Institute of Makers of Explosives, National Fertilizer Association, National Retail Hardware Association, National Automobile Dealers' Association, Memorial Craftsmen of America, and Millers' National Federation. Cf. also "Valuable Insurance Activities of Trade Associations in the United States," Bulletin of the Insurance Department of the United States Chamber of Commerce, reproduced in *The Economic World*, January 5, 1924, p. 26.

useful of the educational services of such a bureau are to be found in the field of conservation. If the risks against which insurance is carried can be substantially reduced, through a wider exercise of care and foresight and a more general adoption of preventive measures, by so much will the cost of insurance tend to fall. Many associations, therefore, have sponsored extensive educational campaigns, not only among their members, but occasionally among the users of their product, for the purpose of instructing all concerned in the means of limiting preventable losses. The most familiar of these campaigns are directed to the avoidance of fire waste and the reduction of industrial accidents.[1]

(*b*) *Negotiation of Adjustments*

The second general function of association insurance departments is to conduct negotiations with insurers on behalf of the whole trade or for the insuring membership. Occasionally this service takes the form of drafting new clauses, as, for example, when the insurance advisers of the National Association of Farm Equipment Manufacturers devised a blanket "floater" policy to cover property which is being continually moved about the country from one point to another.[2] More commonly, however, the negotiations are directed to securing a readjustment of premium rates.[3]

[1] The National Lumber Manufacturers' Association, for example, in addition to publicity work among its own members designed to reduce fire losses, has issued a series of bulletins to the public under such titles as "Fire Stopping on Dwelling Construction" and "Personal Liability for Preventable Fires." These efforts are aimed at reducing the fire hazards of users of lumber, as a means of stimulating the demand rather than at reducing the fire hazards of the associated concerns. The American Gas Association is reported to have accomplished a reduction of 15 per cent in the average fire loss ratio of its membership by means of a campaign on fire prevention which stressed the advantages of a standard watchman service and of periodic self-inspections recorded on blanks particularly designed for the use of gas plants. The American Zinc Institute has taken an active interest in accident prevention and health conservation. And numerous trade associations have co-operated with the National Fire Waste Council of the United States Chamber of Commerce in promoting the observance of "Fire Prevention Week."

[2] See Proceedings of National Association of Farm Equipment Manufacturers, 1921, Annual Report of Insurance Advisers, pp. 168–169. This policy excludes manufacturing plants.

[3] *Ibid.*, 1922, pp. 143–144. Most of the associations maintaining a bureau, or committee, or department of insurance service in any form endeavor to secure for their subscribing members an equitable premium rate as well as a fair adjustment of claims. Replies to a questionnaire sent out to a number of representative trade associations indicate that this service is commonly rendered.

In the field of insurance, no less than in a great many other branches of business enterprise, existing conditions are in no small measure due to mere inertia. The persistence of trade practices and customary terms long after they have outgrown their relation to the conditions from which they sprang or to which they were initially applied is a familiar phenomenon. In insurance, in which so much is still a matter of conjecture, the situation is particularly favorable to the survival of such maladjustments. The classification of risks, even at best, is bound to be very imperfect. Moreover, there is a natural tendency among insurers, so long as their rates on any given class of risks yield an adequate return, to be indifferent, if not lethargic, about adjusting premium charges to altered conditions affecting individual patrons or sub-classes of risks. Yet the hazards in connection with any particular contingency—fire, for example—are continually changing, both as respects entire industries or lines of trade and as respects individual plants, warehouses, stores, and the like. The prevailing type of factory construction, or mode of power transmission, or vicinity of plant location, or what not, may change by imperceptible degrees. Under such circumstances scattered corrections for individual improvements are frequently made, but there may be place also for deliberate reclassification of entire industries with respect to their fire hazard. Such reclassification, tending, as it ordinarily does, towards a revision downwards of the premium rates, is much less likely to be initiated by the insurers than to be secured through pressure exerted by the insured as a group. Readjustments of this character are certainly expedited by the alertness and combined influence of associated action. Similar measures looking to the adoption or modification of special covenants in all insurance policies within the trade covering particular risks have a like justification.

(*c*) *Operation of Insurance Facilities*

Finally, there appears latterly to have been somewhat of a revival of interest in one or another of the various schemes for mutually insuring those engaged in a given trade or industry. Such movements have naturally come within the

purview of trade association activity. It remains unsafe, however, on the basis of available insurance statistics, to generalize with regard to the extent to which this type of insurance function is performed by trade associations.[1] Mutual or quasi-mutual insurance within the limits of established trades or industries has long been in operation, and is by no means necessarily connected with trade association work. It is clear, however, that many trade associations now sponsor or administer agencies for the collective assumption of certain types of risks within their respective jurisdictions. In the main the devices for providing insurance service of this character may be classified into three types. There are inter-insurance exchanges, sometimes known as reciprocals; there are mutual insurance companies, and there are stock insurance companies.

Reciprocal or inter-insurance exchanges are unincorporated associations in which each member exchanges with every other member, represented by a secretary or manager who acts under broad powers of attorney granted by the several subscribers, a contract of indemnity against specified contingencies for specified amounts.[2] Each agrees to pay over to the manager periodically an amount determined by that rate per $1,000 of insurance carried which the manager upon the basis of insurance outstanding and the loss experience of the past, or simply according to the standard rating tables, estimates to be adequate to cover indemnity disbursements plus costs of administration. As usually drawn the contract provides for *pro rata* assessments to make good any deficiencies resulting from abnormal losses, but some exchanges reinsure against such eventualities, the reinsurance premium being included, of course, in the costs of operation. In no event, however, is a subscriber liable for any portion of unpaid losses in excess of his proportionate part of the total risks underwritten. This form

[1] Best's "Insurance Guide with Key Ratings" is perhaps the most dependable source of information. The 1923 edition lists 118 reciprocal insurance exchanges and 2,507 American mutual insurance companies. No attempt is made to distinguish those which are in any way related to trade associations.

[2] For an instructive discussion of the principles and practice of reciprocal insurance, see J. A. Fitzgerald, "Reciprocal or Inter-Insurance Against Loss by Fire," *American Economic Review*, Vol. 10, 1920, pp. 92–103.

of protection was widely sponsored by trade associations during and shortly after the war.[1] Although the exchanges are often organized and operated by persons unconnected with the trade, they almost invariably depend upon the endorsement of a trade association for their establishment and growth. Indeed, even in these instances the fostering influence of association approval and co-operation takes the place, one might say, of advertising and agent solicitation as employed by the regular stock companies.

Mutual companies, with the usual features of this form of insurance, are also organized occasionally by the officers of trade associations, as representatives of the entire membership.[2] In many cases, however, there are several mutual companies writing insurance within the trade, each confined for the most part to a separate local territory.[3] These companies sometimes antedate the organization of the national trade association, and they are to a considerable extent independent of it. But even under these circumstances the insurance bureau of the association is in position to correlate the activities of the independently organized companies and to exercise a supervisory function which will enhance the security of the members. The main objections which have been raised against the organization of mutual companies center around their status as partnerships under

[1] At any rate the number of exchanges organized on a national basis within single industries increased rapidly during this period. See Best's Insurance Guide, *op. cit.*, pp. 272–301. Prominent among the associations offering this type of insurance coverage to their members are the National Association of Dyers and Cleaners, and the National Lumber Manufacturers' Association. There are also a considerable number of exchanges organized and conducted by outsiders, but really operating under the auspices of national or state trade associations, as in the boot and shoe industry, in the ice manufacturing industry, and in the retail hardware trade.

[2] The best known example of an association mutual insurance company was for a long time that of the Paint Trade Mutual Fire Insurance Company, but this corporation was dissolved in November, 1922. See Best's Insurance Guide, *op. cit.*, p. 443. The National Petroleum Association maintains the National Petroleum Mutual Fire Insurance Company. Although the Millers' National Federation itself operates no mutual insurance company, there are a number organized within the trade, largely by different sections of the association membership, and over these companies the association exercises a degree of supervision.

[3] Although the National Retail Hardware Association, for example, does not itself participate in direct insurance arrangements, ten of the state associations, all of which are affiliated with the national association, have organized mutual insurance companies. The states in which these companies operate are Illinois, Iowa, Minnesota, Nebraska, North and South Carolina, Ohio, Pennsylvania, Texas, Washington and Wisconsin.

the laws of many of the states. For example, any contribution to surplus reserve which is made out of the premium of a policyholder (and some contribution is required under the laws of most of the states) goes into a common fund. Should the policyholder subsequently withdraw from the company he must sacrifice whatever share these contributions may represent in the common fund. Furthermore, in the event of drastic and unforeseen losses, the individual subscriber becomes fully and without limit liable for all unpaid claims against the company. These factors have doubtless been responsible, in no small measure, for the much more rapid growth of inter-insurance schemes than of mutual insurance arrangements among trade associations in recent years. Both of the foregoing objections are eliminated under the reciprocal insurance plan.

Finally, there appear to be a few examples of insurance service provided for association members on the stock company basis.[1] As a rule active officials of the association are the organizers of such companies, and good-will rather than contractual commitment is the basis of the expectation that service rather than profit will be the guiding principle of their administration. In general, the origin of this sort of experiment, as of the other methods of funding risks within the trade, is to be found in a feeling among men in the industry that their risks are unjustly classified by the regular insurance companies, or that they are discriminated against in the adjustment of claims or otherwise. The prospect of achieving economies, because the business of the trade membership might be made available without the expense of solicitation, and, at least in the case of reciprocals and mutuals, because the companies are not organized for profit, has likewise stimulated these association insurance undertakings. But while such criticism of established insurance adjustments may not infrequently be merited, and

[1] The Associated General Contractors of America have organized the Contractors' Service Corporation, which handles chiefly the so-called indemnity insurance (that is, bonding for the faithful performance of contracts) of those members who care to avail themselves of its privileges. See Bulletin, Associated General Contractors of America, February, 1921, p. 13. The Silk Association of America also undertook to organize a stock company for writing the transit insurance of its members, but before the plan was put in operation the express companies reduced their rates in a way satisfactory to the association, and so the scheme was abandoned.

the expectations of economy in some measure realized, there are certain shortcomings of these association insurance projects of which account must be taken.[1] One serious defect is inherent in trade-restricted insurance. It is a basic principle of all insurance that the wider the distribution of losses, the more even and regular the burden of such losses. When the area over which an insurance enterprise operates is restricted to a given trade or industry, sharp fluctuations in the burden borne by the associates are almost inevitable. Accordingly, in the case of a reciprocal exchange or a mutual company restricted within the confines of a particular trade, it is very difficult to avoid an unstable alternation of dividends and assessments. Furthermore, sound judgment and unimpeachable integrity are indispensable to the successful administration of an insurance enterprise. Long experience provides the most effective guarantee of these qualities, and hence these newer trade association activities are at least at a temporary disadvantage.

In the last analysis the soundness and expediency of embarking upon a policy of mutual or reciprocal intra-trade insurance is controlled by the peculiar circumstances of each trade.[2] A closely localized industry will be confronted with far different considerations from those influencing industries with widely dispersed plants. Similarly, the types of risk to be insured against will constitute a vital factor in determining the feasibility of any of the various devices for funding risks within the trade. But whether a trade association extends its insurance functions into this tempting field or not, there remains a great opportunity for effective co-operation in the minimization of hazards, in

[1] These shortcomings have been especially emphasized in the attacks made against reciprocal exchanges by old line insurance companies. See statements and short articles in current issues of the *National Underwriter* (for example, May 1, 1924) and of the *Economic World* (for example, March 24, 1924).

[2] In the study of "National Trade Associations" made by the National Association of Manufacturers in 1922, only five of the one hundred or more trade associations surveyed had taken direct measures toward insuring their members. These associations were the American Coat and Suit Manufacturers' Association, the National Association of Farm Equipment Manufacturers, the Millers' Mutual Federation, the Paint Manufacturers' Association of the United States, and the National Petroleum Association. It should be observed, however, that this list takes no account of the semi-official status of numerous independent inter-insurance exchanges, mutual companies, and even stock companies. See pp. 12, 29, 94, 119, 191 and 200.

the extension of insurance protection through educational effort, and in the vigilant preservation of fair treatment of association members at the hands of their insurers. In one way or another co-operation in insurance matters is coming to be recognized as one of the avenues of real service which reflect the constructive character of the trade association movement.

CHAPTER XVIII

ESTABLISHMENT OF TRAFFIC BUREAUS

§1. The Significance of Transportation and the Co-operative Negotiation of Rate and Service Adjustments

Modern industry and modern transportation are inseparable. The factory system of production, involving large-scale enterprise, machine processes, a high degree of specialization, and the minute subdivision of tasks, is basically dependent upon extensive markets; and these markets, in turn, can be rendered available to the producer only through an adequate system of transportation. Without adequate facilities for the easy and economical movement of raw materials and food products, and without an efficient and flexible system of transport for the large and diversified output of industrial activity, the characteristic features of modern business organization and processes and the distinctive fruits of the established economic order would be largely deprived of an environmental element which is indispensable to their maintenance.

This situation has led the shipper to regard his transportation costs and facilities as highly significant elements conditioning effective performance of his productive functions, and has resulted in trade co-operation to secure improvement and economy in shipping service. This is a clearly legitimate and constructive channel of association activity. Such co-operation, which is generally pursued through the establishment of traffic bureaus, is designed, essentially, to achieve two ends: to facilitate the development of equitable rate and service relationships as between different industries and different localities, and to assist the individual associates, particularly the smaller concerns which are without the aid of competent traffic management, to solve the numerous intricacies of classifications, tariffs,

routing, service regulations, loss and damage claims, and the like, which surround the shipment of goods. These association services tend fundamentally to foster and preserve the vitality of competitive forces, both within the given industry and with reference to more or less alternative industrial undertakings.

Nothing is more deadening to business initiative and destructive of business rivalry than deliberate discrimination or unconscious maladjustment in transportation rates or service. If the facilities of railroads and other common carriers are not available to all upon substantially similar terms for similar services, enterprise is choked and competition is stifled. Without access to his natural consuming markets upon an equal basis with his competitors, no producer, however efficient and resourceful he may be in the management of his plant, can be expected long to survive. In like manner, no producer in any given locality can attain the commercial or industrial importance which is warranted by his business enterprise or economic advantages, and no industry can realize its full promise, if maladjustments in classifications or tariffs impose upon them undue burdens of transportation cost, as compared with the industrial structure as a whole or with producers in competing localities or industries. All this is no new discovery. It is the lesson of bitter experience extending back to the very inception of the era of production on a large scale for wide-flung markets. It has found repeated expression in both state and federal legislation. The Act to Regulate Commerce, with its numerous supplements and amendments, has explicitly disclosed the purpose of Congress to invigorate and reenforce the public policy of keeping the highways of interstate commerce open to all upon reasonable, just and equal terms. But the regulatory powers conferred upon the Interstate Commerce Commission to this end, because of the wide field of its jurisdiction and the limited resources at its command, have almost of necessity been exercised, in large measure, for the suppression of deliberate and wilful evasions of the statutory prohibitions.

As a police agency, the Commission's work in this field has primarily been directed to the discovery and elimination of conscious and covert favoritism, whether of business con-

cerns, of localities, or of industries; for favoritism in any form always eventuates in personal discrimination. Noteworthy results have been achieved through these efforts. But maladjustments in the published classifications, tariffs or service regulations may prove just as subversive of normal economic development as illegal departures from the established rate structure or prevailing traffic practice. And since industrial conditions are in a constant state of flux, the occasions for change and adjustment are frequent and urgent. It is true, of course, that as a quasi-judicial agency the Commission has taken cognizance of and has often sought to remedy such maladjustments in rates and service as have emerged in the course of the development of railway systems, the decline of waterways, the evolution of industrial processes and commercial usages, and, in general, the changing circumstances of our economic life. But with rare exceptions these changes have been introduced as a result of complaint rather than on the initiative of the Commission, and in the absence of a single all-embracing principle of rate-making numerous illogical and, at least superficially, incomprehensible rate relationships, which are the result of historical growth and which have influenced the prevailing industrial and commercial situation, are bound to survive. The task of improving these relationships of rates and regulations, as between different industries and different localities, is largely a problem of removing unreasonable maladjustments. This task can be substantially facilitated through the vigilant and concerted efforts of the various interests involved.

The primary purpose, then, of trade co-operation in transportation matters is to secure and maintain equitable rate and service relationships, to the end that the given trade or industry may not be subjected to undue burdens. The efforts of trade associations in the attainment of this purpose are directed toward the presentation of relevant facts and the negotiation of appropriate adjustments. The informed and joint pressure of a closely organized group of shippers is better calculated to safeguard and advance the interests of the industry than the sporadic efforts of individual producers. These negotiations are conducted with individual carriers, conferences or associations of carriers, and railroad or public

service commissions. The subject-matter of negotiation is of a broadly comprehensive scope. While it naturally varies in different industries, and in accordance with the resources and experience of the particular traffic committee or bureau, it includes questions of rates and classifications, both for the products of the association members as such and in comparison with those for competitive products, of charges on raw materials, intermediate goods, imports and exports, and matters of minimum car-load weights, mixing privileges, packing requirements, demurrage arrangements, and similar service regulations.[1]

§2. The Informative Function of Traffic Bureaus

But the activities of trade associations in transportation matters are not confined to negotiation with carriers or public bodies for the purpose of improving rate and service relationships. Substantial assistance can be rendered to the associates even within the bounds of established rate and service adjustments. The complexity of the rate structure and the technical character of the numerous service regulations afford fruitful opportunities for co-operative action. The burden of transportation charges can be lightened and the scope of the competitive market can be extended, particularly for the small-scale concerns which have failed to recognize or to utilize the advantages of expert traffic management, through a more intelligent use of existing transportation facilities. Lack of knowledge, rather than want of power, is frequently responsible for the prevalence of burdensome distribution costs and of artificial restrictions upon market outlets. The establishment of association traffic bureaus tends to ameliorate this situation. Such bureaus serve to render available to association members a valuable fund of knowledge concerning means of expediting shipments, reducing freight costs, and reaching various market areas. They direct attention, among other things, to the significance

[1] The reports of trade associations engaged in this type of activity illustrate the nature of the problems covered and the methods pursued. See, for example, the *Silkworm*, official bulletin of the Silk Association of America, Feb., 1921, pp. 16–20; and "Rubber Association Activities During 1922," Rubber Association of America, Dec., 1922, pp. 16–18.

of different packing methods, alternative routings, changes in billing practice, the adoption of "break bulk" shipments, the utilization of various types of equipment, and of a host of other expedients. Activity of this type involves the performance of what may be called the informative function of trade associations in transportation matters. In some instances, however, the central bureau goes one step further—it actually renders specific services of a routine character for the members of the association. In these cases the informative function is supplemented by what may be called the operative function.

The informative function is manifested most clearly in the publication of compiled freight tariffs, effective as of a given date, applicable to the raw materials and finished products of the particular industry. The condensation of the schedules of rates, through the elimination of data and rules of no special significance to the participants in the given trade and the assembly of relevant material from the tariffs within the several freight rate territories, provides valuable aid to officers responsible for shipping instructions. In some instances, instead of publishing such a compendium of rate information, a complete file of established classifications and tariffs is maintained at the bureau headquarters and members are permitted and usually urged to avail themselves of the privilege of confirming rates quoted by the carriers. In addition to these basic data, much more specific information, reflecting the constantly changing character of the traffic situation, is generally provided to the members by the association bureau. The associates are bulletined upon announced classification changes, rate modifications, the imposition or removal of embargoes or of zone restrictions, the establishment or withdrawal of transit privileges, alterations of train service, the availability of cargo space, modifications of export and import tariffs, and like matters of interest to the members either as shippers or as consignees. Prompt and complete knowledge of such circumstances is essential to effective traffic management and to the maintenance, among manufacturers and traders, of orderly competition over wide market areas.

§3. The Operative Function of Traffic Bureaus

What has here been termed the operative function of trade associations in transportation matters involves the actual transfer of part of the administrative responsibility for the affairs of the several independent business units from their respective executive staffs to the common traffic bureau. The performance of this function is not essential to the maintenance of an association traffic bureau, and numerous trade associations which support active traffic departments, for the purpose of negotiating general rate and service adjustments with common carriers and public bodies and keeping their members informed upon current developments in freight charges and shipping practice, make no attempt to act for the individual associates in their specific dealings with the carriers. And even among those associations which do perform this function, the range of responsibilities thus assumed varies widely. Those most commonly covered are concerned with the auditing of freight bills, the collection of overcharges, the checking of rates in connection with carriers' demands for undercharges, the adjustment of damage claims resulting from loss or injury to goods, the tracing of shipments, and the provision of an adequate car supply. Through such activities the information and advice furnished by association bureaus, which lead to more efficient and more intelligent traffic policies on the part of the associates, is supplemented by the actual performance of expert traffic service by the staff of the association bureau. The need of such service is most urgent, and its use is most extensive, among concerns which have paid little or no attention to the organization of their own traffic departments.[1]

[1] The foregoing analysis of the work of association traffic bureaus into negotiating, informative, and operative functions is designed to clarify the essential character of trade association activity in transportation matters. In actual practice, however, there is no such distinct separation in the performance of these various functions, and the activities of many bureaus comprehend all of these fields to a greater or smaller extent. The reports of these bureaus to their associations are more enlightening than general descriptive material. See, for example, the Report of the Traffic Department of the National Association of Farm Equipment Manufacturers for 1923 (Proceedings of Thirtieth Annual Convention and Annual Reports of Officers, Committees, and Departments, Chicago, 1923, pp. 110–116) describing the activities of the Department with regard to freight claims, auditing of freight bills, rate quotations, undercharges, freight bulletins, embargoes, tracing shipments, changes in classification ratings and tariff rates, mixing privileges, and export business.

§4. The Organization of Traffic Bureaus

In conclusion, brief reference may be made to the methods of organizing this type of trade association activity. The mode of organization employed varies chiefly with the nature of the functions discharged. For the performance of the simpler services, a standing committee of members may suffice.[1] Such a committee serves as a focal point for the assembly of the collective experience of the trade, or for the marshalling of the scattered forces of the trade in order that the maximum of pressure may be exerted in dealing with the carriers. But association members are bound to be primarily concerned with their own private interests and seldom qualify as traffic experts. Accordingly, while traffic committees commonly constitute part of the machinery of trade associations, the organization of special bureaus or departments, properly equipped and provided with adequate and trained personnel, has not infrequently been found an indispensable supplement.[2] Under these conditions facilities are provided for rendering all of the transportation and traffic services of the association in most effective fashion. Opportunities are available for systematic and intensive study of the leading traffic problems confronting the industry, and the data so gathered not only enhance the influence of the association in negotiating rate and service adjustments with transportation agencies and public commissions, but they assist the association members in formulating their individual traffic policies by enriching the fund of knowledge and information at their disposal. The necessary machinery is also created thereby for the centralized performamce of certain types of expert traffic service for the associates, and the revenue derived fron this service often contributes substantially to the maintenance of the entire traffic organization.

[1] As, for example, in the National Lumber Manufacturers' Association (Twentieth Annual Report of the Association, 1922, p. 37), in the National Association of Sand and Gravel Producers ("National Trade Associations," *op. cit.*, p. 217), in the Millers' National Federation (*Ibid.*, p. 120), and in the American Drug Manufacturers' Association (Proceedings of Tenth Annual Meeting, 1921, pp. 189-191).

[2] As, for example, in the Associated Cooperage Industries ("National Trade Associations," *op. cit.*, p. 72), in the Southern Pine Association (*Ibid.*, p. 157), and in the National Association of Farm Equipment Manufacturers (Proceedings of Thirtieth Annual Convention, 1923, pp. 104–116).

There are, however, always practical considerations, depending upon the peculiar circumstances surrounding the given industry, which influence the choice of method in seeking economy and improvement in shipping service. The territorial extent of the industry, the nature of the goods purchased and sold (particularly with respect to their uniformity or variety), and the degree to which individual members have already developed their independent staffs for studying and handling traffic problems, all affect the character of the methods used in carrying on this work. In some instances, for example, the services of privately organized traffic bureaus, which are entirely independent of the association, have been utilized. While the assistance of these outside bodies, rendered for a price, is doubtless valuable, it does not reflect the needs of the trade as a whole as effectively as the service of an association traffic department. Even under these circumstances, however, the association committee is generally not abandoned, but acts as a guide to the outside bureau and represents the association officially in formal proceedings. Under some conditions, moreover, trade associations, instead of utilizing an independent outside bureau, have established, under their own auspices, a separate organization devoting itself entirely to problems of transportation and traffic. In some respects this is a more highly specialized form of the association traffic bureau and functions at least as effectively.[1]

[1] *Cf.* the following from Franklin D. Jones, "Trade Association Activities and the Law," New York, 1922, p. 177: "It is also possible, particularly if members of an association will not properly contribute to the maintenance of a traffic bureau within the organization, to organize a separate association devoting itself solely to traffic matters. Such an organization will of course effect a high degree of specialization to the great benefit of the industry and its members. The Southern Hardwood Traffic Association composed of some 500 members is a fine type of such an organization. It has worked most effectively in many important cases involving rate adjustments of great magnitude and has saved the industry large sums of money. It also publishes a rate book giving in simplified form the through rates from all producing to all consuming territories. It keeps constantly in touch with embargoes, furnishes correct information to its members on rates, corrects claims, aids its members in securing a proper car supply, in fact performs all the services of a traffic bureau with all the weight of associated activity behind it. Such an organization is apt to be more adequately financed than a traffic bureau within an association because of the difficulty in apportioning the budget between the various activities which always confronts an ordinary trade association."

CHAPTER XIX

IMPROVEMENT OF EMPLOYMENT RELATIONS

§1. The Principal Methods of Regulating Labor Relationships

There are few aspects of the trade association movement that are at once more neglected and more promising than the opportunity afforded through co-operation of employers for the promotion of amicable relations with their employees. The very fact that labor relations are frequently spoken of as industrial relations indicates their significance for the smooth functioning of the economic mechanism. Unfortunately, however, the competitive organization of industry, when free from regulation by public authority and from collective action by employers and employees, tends often to disturb and even to disrupt smooth employment relations, rather than to compose the conflicts of interest which continually emerge. The social and economic wastes which have resulted from this situation are among the most striking features of private competitive enterprise.

(*a*) *Labor Legislation*

Three principal methods have been pursued in efforts to mitigate these wastes. The first is through legislation. To a considerable extent most of the states, as well as the federal government, have taken measures to prevent socially wasteful labor conditions. Remedial legislation of this character, while indispensable in some matters, cannot be expected to achieve the greatest improvement of employment conditions all along the line. As labor legislation binds all employers for the sake of protecting the workers, and ultimately the general public, against the undesirable policies of the few, it introduces an inflexible factor into economic adjustments which hinders experimentation and tends towards a lethargic indifference on both sides of the

employment relation. Under our existing system, therefore, it must necessarily confine itself, in large measure, to the eradication of patent and extreme maladjustments. Far-sightedness and good-will cannot be legislated into human relationships. Beyond the furthest practicable limits of social legislation, there lies a region in which voluntary action alone can stimulate more equitable and more tranquil co-operation among the several groups which participate in the processes of our economic life.

(b) Collective Bargaining

The second method by means of which it has been sought to find a *modus vivendi* for industry within the employer-employee relationship is through the organization and militant assertion of the collective power of the rival groups. The beginnings in this direction were naturally made on the side of labor, through the progressive development of trade unionism; but the method of collective bargaining, which has been evolved as a voluntary regulating mechanism of employment relations alongside the mandatory requirements of legislative enactment, has been gradually developed on the employers' side as well as on the side of the employees, and has come to encompass, in some fields of economic activity, the whole or a large portion of the trade or industry.

In the gradual approach to this status trade associations have frequently played an active rôle. In not a few instances these associations have been enlisted as the medium of collective bargaining with trade unions. Annual agreements have been executed between the associated glass bottle manufacturers and the Glass Bottle Blowers' Association since about 1885.[1] The United States Potters' Association has had an arbitration agreement with the National Brotherhood of Operative Potters for a number of years.[2] The Granite Paving Block Manufacturers' Association makes regular contracts with the several labor organizations representing their employees through a Labor Committee which

[1] John A. Voll, "Collective Bargaining in the Glass Bottle Industry," *Annals of the American Academy of Political and Social Science*, Vol. XC, July, 1920, pp. 50–51. The manufacturers' association covers only the hand-blown section of the industry.

[2] Proceedings, United States Potters' Association, 1919, p. 28. See, also, *Monthly Labor Review*, U. S. Bureau of Labor Statistics, Feb., 1924, pp. 24–26.

has full power to sign agreements for the association members.[1] At one time the Newspaper Publishers' Association negotiated wage rates and working conditions with the International Typographical Union.[2] But these instances illustrate a method of procedure which is not widely followed and is not growing in trade association practice. The difficulty has been that there seldom exists a unanimous, and often not even a preponderant, opinion among the associated employers upon the wisdom or expediency of this mode of composing employment relations. Some manufacturers and merchants in almost every line of trade are unalterably opposed to any form of dealing with trade unions. Since they refuse themselves to negotiate with labor organizations, they naturally object to having the trade association of which they are actual or potential members engage in any such activity. Most trade associations, therefore, eschew this highly controversial field of action altogether, while some actively exert their influence to suppress militant unionism, or at least to eradicate what are regarded as its evils, in their particular industries.[3]

Since a trade association is primarily the inclusive organization of the sellers of a given commodity or service, the associates, or such of them as can come to agreement, may well be justified in organizing a distinct agency for the settlement of terms and conditions of employment, if joint dealing with the unions is deemed desirable or inescapable for a considerable section of the given industry. This type of solution has actually been adopted in several instances. The Stove Founders' National Defense Association, for example, representing about 80 per cent of the stove manufacturers in the United States, exists primarily for the purpose of collective bargaining.[4] For other purposes the in-

[1] "National Trade Associations," *op. cit.*, p. 130.

[2] Carl H. Mote, "Industrial Arbitration," Indianapolis, 1916, p. 301.

[3] Conspicuous among such associations are the National Erectors' Association, the National Association of Pattern Manufacturers, the National Metal Trades Association, and the National Founders' Association. The *Open Shop Review* is published jointly by the last two associations mentioned.

[4] John P. Frey, "A Thirty-Year Experience in Industrial Democracy," *International Labor Review*, Geneva, Switzerland, April, 1922, p. 545. *Cf.* also, Frank T. Stockton, "The International Molders' Union of North America," *Johns Hopkins University* Studies, Series 39, No. 3, Baltimore, 1921.

dustry is organized in the National Association of Stove Manufacturers. In the printing industry the difficulty has been met by an outright recognition of the conflicting attitudes of the participants in the trade. "Two . . . divisions, known respectively as the Open Shop Division and the Closed Shop Division, completely autonomous in themselves, with a liaison committee known as the Industrial Relations Committee . . ., have been provided as a practical working organization to handle the highly controversial questions involving labor policy."[1] In some cases, moreover, failing agreement to disagree within the association, or the establishment of a separate and distinct employers' association, there has resulted a dual trade organization in the industry. The Employing Photo-Engravers' Association of America, for example, is a trade association sponsoring the open shop principle in labor relations. Within the same industrial field, however, the American Photo-Engravers' Association, composed of firms or individuals operating their establishments on either the union or open shop basis, through its officers participates, upon request from individual members or affiliated local or sectional organizations, in wage negotiations and the settlement of labor controversies.[2]

(c) Ex Parte Efforts of Employers

The third method of seeking a way out of the vexatious difficulties of the employment relation is through *ex parte* efforts of employers to eradicate, as far as possible, grounds of complaint among employees. This method likewise involves a voluntary procedure for counteracting the excesses to which an unbridled pursuit of competitive advantage tends to lead, and for developing practices in closer harmony with changing industrial conditions and social ideals. It is manifest that advancement in this direction depends upon an educational process. It is true, of course, that sporadic

[1] F. A. Silcox, "Standardization and Co-operation in the Printing Industry," Academy of Political Science, New York, Proceedings, Vol. IX, Jan., 1922, pp. 46, 52. The Closed Shop Division is now called the Printers' League of America and the Open Shop Division the Open Shop Printers of Amerca.

[2] Constitution and By-Laws of the American Photo-Engravers' Association as amended June 25, 1921, p. 6.

efforts, springing from individual initiative, have indicated the promise of achievement which can be realized from the studied application of a great variety of meliorative methods, ranging all the way from the simple provision of adequate sanitary facilities in shops, to the introduction of elaborate schemes of employee representation, profit sharing, and welfare work.[1] But the fruitfulness of this mode of approach can be enhanced, almost invariably, through concerted action. Improvement in the administration of many of these tentative devices must come from mutual counsel and interchange of experience, and much of their practicability and effectiveness depends upon their wide-spread adoption. A levelling-up process all along the line removes the disrupting effects of competitive pressure and leaves no place for invidious comparisons which rankle. The exertion of the collective influence of a representative body of employers in each branch of industry, in place of exclusive reliance upon the independent initiative of individual concerns, is calculated to establish firmer foundations for the business structure through these means. A trade association engaged in genuinely educational efforts to improve the relations between managers and workmen tends to increase the efficiency and maintain the continuity of productive operations, and contributes thereby to the effective functioning of the competitive process.

This does not mean deadening uniformity of policy. Such co-operative action is directed to the development of minimum rather than maximum standards, and unlimited scope still remains for vigorous experimentation and even for revolutionary change. Nor is it assumed that trade associations, or any other *ex parte* agency, can completely solve the problem of adjusting labor relationships satisfactorily. It is obvious, however, that there is ample scope for the voluntary improvement of employment relations in the day-to-day functioning of the economic process. And trade associations, as we have seen, are in position to induce the fullest realization of these possibilities.

[1] "Welfare Work for Employees in Industrial Establishments in the United States," U. S. Bureau of Labor Statistics, Bulletin No. 250, Washington, 1919.

§2. The Character of Association Activities for Improvement of Labor Conditions

The nature of some of the tasks involved and the character of their results can be illustrated concretely by reference to the proceedings of a recent conference on employment conditions in the paper box-board industry. The Box Board Association, representing a majority of the manufacturers, co-operated with the Department of Labor in calling a general meeting of all concerns interested in the trade, which led to the adoption of a shorter hours policy, involving the elimination of Sunday work and the establishment of three eight-hour shifts.[1] The immediate initiative seems to have come from a leading manufacturer, whose statement revealed the deplorable conditions which the action of the conference was designed to eradicate. In the words of the published report of the conference: "According to [this] statement the 2 tours [that is, shifts] of 11 and 13 hours on which many paper-board mills are still being run 'are indefensible on any ground, civil, moral, or economic.' The practice 'is a survival of the submissive past and a reproach to the industry.' In the last few years some mills have adopted the three-tour system of 8 hours each, other mills have decided on five days' operation, with clean-up, repairs, and machine adjustments on the sixth day, Saturday, and the whole of Sunday for rest. A group of 17 or 18 mills representing approximately one-half of the total production in the United States agreed on the latter plan, the immediate results of which were increased efficiency and a higher-grade and more contented labor force. The members of the group found, however, that they were not in a position to compete with the mills running on two tours for six consecutive days and using Sunday to get ready for another six days of continuous operation. So the new plan was abandoned by all except 'a few mills less vulnerable to reactionary competition,' which have found the new scheme satisfactory and beneficial."[2] It may be noted that

[1] "Conference of Paper Box-board Manufacturers on Shorter Working Hours," *Monthly Labor Review*, U. S. Bureau of Labor Statistics, June, 1924, pp. 1–10. The full Proceedings of this Conference have been published by the Bureau of Labor Statistics, Washington, 1924.

[2] *Ibid.*, pp. 3–4.

one of the chief causes alleged to have prevented the immediate spread of the three-tour plan was "the long-established habit of operation under the ancient order." For the elimination of Sunday work, the following resolution was introduced: "It is the sense of this meeting that we change the working hours of the industry to five days of operation consisting of 120 hours, the sixth day reserved for the changes and repairs, and the entire elimination of Sunday work."[1] After a lengthy discussion this resolution was adopted. In a concluding session, presided over by the Secretary of Labor, the conference also adopted a resolution to abolish the 11 and 13 hour tours, to introduce "the eight-hour tour as soon as possible, and not later than January 1, 1925," and the eight-hour day was recognized as the "proper labor hours in the industry."[2] The Commissioner of Labor Statistics is reported to have expressed his gratification at the action taken by the paper box-board manufacturers, and to have "warned that no line of industry in this country could go on much longer on a basis of 11 and 13 hour tours and 7 days a week without labor troubles that would 'jar us all.' He expressed his belief, however, that such troubles had been averted in the box-board industry."[3]

The foregoing abstract of the proceedings of this particular trade conference has been introduced simply to illustrate the nature and possibilities of voluntary joint effort for the improvement of employment relations. In numerous other industries trade associations have devoted their attention to a great variety of measures for achieving better relations between employers and employees. The United Typothetæ of America, for example, have for many years maintained a national training school for apprentices in Indianapolis.[4] The association is preparing an extensive system of instruction material for apprentices. It also publishes a number of books for home study by employed printers, and it contributes to the support of the School of Printing at the Carnegie Institute of Technology where advanced study in the art may be pursued.[5] Through its Department of Education it

[1] *Ibid.*, p. 4. [2] *Ibid.*, p. 8. [3] *Ibid.*, p. 10.
[4] *Typothetæ Bulletin*, United Typothetæ of America, Dec., 1917, pp. 95–103.
[5] *Ibid.*, Nov. 1918, pp. 98–104.

supervises the printing departments of Dunwoody Institute at Minneapolis and Wentworth Institute in Boston. The entire educational program of the association is in charge of a Director of Education. The National Metal Trades Association also conducts apprenticeship courses for beginners,[1] while the National Association of Upholstered Furniture Manufacturers goes beyond this apprenticeship service, and undertakes, besides, job analyses for increasing the efficiency of experienced workers.[2] Similarly, the Technical Association of the Pulp and Paper Industry has extended its educational activities to all employees, and has developed a complete course of instruction for workers in the pulp and paper industry.[3]

A number of associations have fostered safety campaigns and have contributed to the development of safety standards within their industries. For several years the National Electric Light Association has had a committee studying accident prevention measures, and it has issued several detailed reports in this field.[4] The National Founders' Association and the American Foundrymen's Association have acted as joint sponsors of a safety code for the protection of foundry workers.[5] An extensive safety program is also being carried out by the National Association of Tanners.[6] The Portland Cement Association "has prepared annually since 1913 a 'Study of Accidents' occurring in the plants of member companies"; and it also "issues a bimonthly 'Accident Prevention Bulletin,' which contains

[1] "Apprenticeship in the Metal Trades," National Metal Trades Association, Chicago, 1922.

[2] "National Trade Associations," *op. cit.*, p. 107.

[3] "Personnel Research Agencies," U. S. Bureau of Labor Statistics, Washington, 1921, Bulletin No. 299, p. 157. See also "Facilities for Correspondence and Class Instruction on the Manufacture of Pulp and Paper Available in the United States and Canada," Published by the Joint Vocational Educational Committee, September, 1924.

[4] Report of Accident Prevention Committee, National Electric Light Association, New York, 1920. *Ibid.*, 1921.

[5] "Safety Code for the Protection of Workers in Foundries," U. S. Bureau of Labor Statistics, Bulletin No. 336, Washington, 1923.

[6] "Safeguarding Workers in the Tanning Industry," U. S. Department of Labor, Working Conditions Service, Washington, 1919, p. 18. The National Association of Tanners has now been merged in the Tanners' Council of the United States of America.

papers on health and accidental hazards of the cement industry."[1] A Safety Department of the Southern Pine Association was organized in 1919, with a salaried director, "to assist the members of the association in the reduction of accidents among their employees and to collect and distribute information of value in this work."[2] It prepared and published a series of safety bulletins; but the work was subsequently discontinued. Other associations which have cooperated in the reduction of industrial hazards include the American Dyes Institute and the American Gas Association.[3]

A broader range of endeavor in this general direction, looking to the development of better shop sanitation, indoor and outdoor recreational facilities, numerous welfare expedients, and even the regularization of productive operations with attendant reduction of unemployment, has characterized association work relative to employment relations in some instances. Thus, with respect to the more significant of these efforts, the United Typothetæ of America established in 1919 a Department of Industrial Relations, "to provide within the printing industry centralized investigation, coordination, analysis, interpretation, and distribution of information on the problem of industrial relations between employer and employee which will eventually lay the foundation for the formulation of broad, constructive policies leading to greater uniformity in wages and existing conditions, and to the elimination of strikes through voluntary conciliation and arbitration."[4] Among the accomplishments of this Department is the completion of an intensive investigation of profit-sharing and bonus systems in printing plants in the Chicago district,[5] and a comprehensive survey and analysis of the labor policies followed in the shops of each member of the association.[6] In the men's clothing industry, which, for

[1] "Personnel Research Agencies," *op. cit.*, p. 71.

[2] *Ibid.*, p. 154.

[3] *Ibid.*, pp. 71, 75.

[4] *Ibid.*, pp. 160–161. In 1923 the functions of this Department were enlarged and it became the Department of Research.

[5] F. E. Wolfe, "Survey of Profit-Sharing and Bonuses in Chicago Printing Plants," *Journal of Political Economy*, Vol. 29, July, 1921, pp. 521–542.

[6] "Personnel Research Agencies," *op. cit.*, p. 161.

the most part, is organized locally, considerable progress has been made in several centers in the co-operative development of labor standards.[1] The Baltimore Federation of Clothing Manufacturers maintains a Research Bureau which compiles information and undertakes studies calculated to bring about "general improvement and standardization of working conditions" in the plants within the Baltimore area. "The principal aim of this federation is unified action on questions of wages, hours of labor, and general working conditions. . . It is also studying the situation in the men's clothing industry with a view to obviating as far as practicable the seasonal character of the industry and periodical unemployment."[2] The Tanners' Council of the United States of America at one time undertook a complete labor survey of the industry.[3]

In various ways, then, trade associations have accepted the challenge to the equitableness and effectiveness of the traditional methods of dealing with labor under the employment contract. They have sought to improve employment relations, to the end that productive efficiency might be increased and the continuity of industrial processes maintained. While a promising beginning had been made by individual employers, and while exploration and pioneering in this field continues to be dependent upon the vision and initiative of the individual operating concern, it has become increasingly clear that advancement all along the line constitutes an essential element in the situation, and that such progress can be realized only through co-operation and education.

[1] The most conspicuous advances in labor relations in the men's clothing industry have been achieved in the Chicago and Rochester markets. The improvement of employment relations in these markets has been largely attained through collective bargaining, under the leadership of the Amalgamated Clothing Workers of America, rather than through the initiative of individual manufacturers or at the instance of trade associations. See "The Clothing Workers of Chicago. 1910–1922," The Chicago Joint Board, Amalgamated Clothing Workers of America, Chicago, 1922; E. W. Morehouse, "Development of Industrial Law in the Rochester Clothing Market," *Quarterly Journal of Economics*, Vol. 37, Feb., 1923, pp. 257–290; H. A. Millis, "Unemployment Insurance in the Men's Clothing Industry of Chicago," *University Journal of Business*, Vol. 2, March, 1924, pp. 157–168; and "Experience With Trade Union Agreements—Clothing Industries," Research Report No. 38, National Industrial Conference Board, New York, June, 1921.

[2] "Personnel Research Agencies," *op. cit.*, p. 86.

[3] *Ibid.*, pp. 87, 155.

Through exerting the collective influence of a representative group of employers within each industry, trade associations are in position, as is no other *ex parte* agency under the current industrial régime, to stabilize employment relations and contribute thereby to the fulfillment of the best possibilities of the competitive process.

CHAPTER XX

COMMERCIAL ARBITRATION

§1. The Shortcomings of Judicial Determination of Commercial Disputes

Disputes between buyers and sellers are a very frequent accompaniment of commercial intercourse. An industrial system which functions under the rules of private property and free contract necessarily brings the interests of numerous parties into constant opposition, and disagreement as to the rights and obligations of the contending parties often results in open controversy. The growth of litigation during the past half century and the general predominance of civil suits involving business relationships provide concrete evidence of the frequency of commercial disputes. The sources of friction are numerous and varied. The unstandardized character of commercial products, and of the nomenclature descriptive of them or of their essential characteristics, may prevent a real meeting of minds in the negotiation of contracts. The uncertainty and fluidity of trade customs and usages may lead to a like situation. Moreover, business undertakings are frequently entered upon without the formalities, by way of written record, which prudence would dictate, and important terms are often omitted altogether. The vagueness and ambiguity which characterize such dealings lead to conflicting interpretations of the rights and obligations of the parties, and sharp differences of opinion develop as to whether, and to what extent, the actual or proffered performance is in accord with the terms of the agreement.

These circumstances, coupled with the fact that irresponsible buyers and sellers sometimes yield to the temptation, particularly in fluctuating markets, of seeking financial advantage through the repudiation of their binding engagements, have rendered commercial disputes both common and burdensome. They are not only costly to the immediate

disputants and, when sufficiently recurrent and wide-spread, reflected in enhanced prices, but they tend to undermine the element of good-will in business dealings, and to obstruct the attainment of that smooth and continuous adjustment of business relationships through which alone the full potentialities of competitive enterprise may be realized. Co-operative action, therefore, which is designed to mitigate the ill effects of this situation may clearly be counted among the constructive functions of trade associations.

The remedy appears to lie in two directions: the occasions for commercial disputes may be minimized, and the differences which they reflect may be composed more effectively. Association activities calculated to achieve the first of these ends have received consideration in earlier pages. Standardization of products and of trade names, the adoption of uniform contract forms, and the development, through codes of ethics and standard practice arrangements, of norms of business conduct, all tend to render commercial dealings more certain and more dependable and hence to reduce the frequency of commercial disputes. While it is true, as we have seen, that the primary objective of these forms of business co-operation is in no sense confined to the elimination of misunderstanding and controversy in commercial relationships, their influence in this direction is none the less real and substantial. We are here directly concerned, therefore, with only the second of the two problems. In what way may trade associations contribute toward the more effective settlement of commercial disputes?

The regularly constituted courts afford the normal medium for the settlement of such disputes. Their jurisdiction over business dealings is full and complete. But the judicial function of the courts extends to every branch of human affairs. Whenever violations of law are in question or whatever private controversies arise in any of the numerous fields of human activity, resort may be had to the courts for authoritative disposition of the issue. The burden upon the judicial system is both heavy and diversified. In at least two respects, therefore, the established mode of composing commercial differences under the law has become increasingly unsatisfactory. In the first place, judicial procedure has become

less and less expeditious, and to that extent, also, more and more costly. The range and complexity of human intercourse in every direction have so increased that the growing burden placed upon the courts has continually outrun the expansion of the judicial structure. The crowded dockets of appellate courts and the familiar outcry against "the law's delay" are the obvious reflection of this condition. In the second place, the very breadth and diversity of the affairs which come within the compass of judicial jurisdiction makes it quite impossible for judges to gain or retain that intimate understanding and appreciation of the various factors involved in commercial disputes which so vitally advance the speedy and equitable determination of these controversies. The very fact that the judges, at least of the higher courts, may be called upon to adjudicate almost every conceivable type of human tangle tends to detract from the expedition and effectiveness of their disposition of commercial litigation. And such assistance as is rendered available to them through juries of laymen is likewise without that expert quality which is frequently indispensable to a genuine understanding and realistic adjustment of the intricacies of business controversies.

§2. The Nature of Commercial Arbitration

Largely because of these factors which limit the availability of the judicial process and circumscribe the area of its usefulness, there has been a peristent movement in recent years to develop informal, extra-legal agencies for expediting and improving the determination of commercial disputes.[1]

[1] Even the legal profession has recognized the desirability, both of relieving the courts of a mass of causes, often for small amounts but involving intricate details, and of providing more speedy and certain justice to aggrieved merchants and manufacturers. See Report of the Forty-fifth Annual Meeting of the American Bar Association, 1922, Vol. 47, pp. 288–322. The report of the Committee on Commerce, Trade, and Commercial Law, after mentioning the completion, in accordance with an earlier resolution of the association, of drafts of certain statutes referred to below, declared (p. 295): "In the opinion of your Committee, the adoption of the international treaty, the federal statute and the uniform state statute will put the United States in the forefront of this procedural reform. It will raise the standards of commercial ethics. It will reduce litigation. It will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the federal and state courts. In pressing forward this improvement in the law, the Association will align itself with the best economic and commercial thought of the country and will do much to overcome the criticism of the law's delays."

The method thus developed of minimizing friction and dislocation within the economic process in the settlement of business differences is generally referred to as commercial arbitration. It is essentially distinct from the method of conciliation, the prime emphasis of which is upon compromise. While the system of arbitration established in many instances provides for the preliminary exertion of the "good offices" of an arbitration committee to induce an amicable adjustment by the parties to the controversy, the process of arbitration as such aims to secure an impartial consideration of the facts as revealed by the contentions of the parties, usually in the light of prevailing legal principles, and a determination of the issue upon its merits. It corresponds, therefore, to the judicial process, and at the same time is free, to some extent, of the formalities, delays, and expense of litigation. Moreover, it tends to establish a body of technical precedents distinctively applicable to the particular trade or industry, and thus remove in a measure occasions for future misunderstanding; and in so far as provision for arbitration is incorporated into commercial contracts it serves to enhance the confidence of the participants in the integrity and fair dealing of their business connections.

Commercial arbitration is not new in principle. It has been sponsored for many years by local organizations in various sections of the country. The New York Chamber of Commerce has been perhaps the foremost exponent of this practice, and for over a century it has maintained machinery of which business men might avail themselves for the settlement of their differences without undue expense or loss of time.[1] In the last decade the extension of the use of arbitration procedure within the jurisdiction of the Chamber has been pushed with renewed vigor, and the enactment of the New York statute in 1920, whereby arbitration clauses in contracts were made valid, enforceable, and irrevocable, has strengthened the movement appreciably.[2] But a serious

[1] See "A Brief History of Commercial Arbitration in New York," Chamber of Commerce of the State of New York, 1921.

[2] A. J. Wolfe, "Commercial Arbitration and Prevention of Waste," Commerce Reports, U. S. Department of Commerce, Sept. 18, 1922, p. 806. See, also, J. H. Cohen, "Commercial Arbitration and the Law," New York, 1918, Introduction, pp. VII–XVII. For New York statute, see Laws of New York, 1920, Ch. 925, Art. 83, Secs. 1410–1431.

shortcoming of the arbitration machinery set up under the auspices of non-specialized bodies of business men, organized upon the basis of locality rather than along trade lines, is that in dealings with parties not of the vicinity there is frequently a lack of willingness on their part either to agree in advance to arbitrate in the event of dispute, or to submit to arbitration an actual disagreement, under rules not established by themselves. With the widening range of commercial intercourse in practically all industries, the need for the provision of suitable instrumentalities and procedure of more than sectional and sometimes even of more than national scope has become manifest.[1] On the other hand, while arbitration arrangements may be too narrow in their compass from a territorial standpoint, they may be unduly extensive with respect to the variety of industries which they comprehend. Arbitration machinery of an inter-trade character tends to become cumbersome and unwieldy. Business men outside of their own particular trade face the same handicaps in hearing and judging the intricate issues of commercial disputes as professional lawyers on the bench, and the maintenance of a list of eligible arbitrators, providing an adequate choice, for industry as a whole would be a Herculean task, particularly if every section of the country were properly represented.

Accordingly, the tendency of more recent practice has been toward the adoption of a loosely formal arbitration procedure and the establishment of an administrative agency within the distinct lines of each of the several trades.[2] For this purpose the organization of industry into trade associations has afforded a natural line of demarcation, both territorially and functionally, and many associations have

[1] In this connection attention should be called to the enactment, too late for discussion in the text, of the United States Arbitration Act (H. R. 646, 68th Congress, 2d Session), which was signed by President Coolidge February 12, 1925. This law is applicable not only to all contracts involving interstate commerce but also to maritime transactions and provides that a written agreement to submit to arbitration any dispute connected with such transactions shall be valid and enforceable. Provision is also made for the enforcement of arbitration awards in those cases in which the parties in their agreement have specifically provided that a court judgment may be entered upon the award.

[2] See A. J. Wolfe, "Progress of Commercial Arbitration," Commerce Reports, U. S. Department of Commerce, Sept. 11, 1922, pp. 734–735. See, also, Commerce Reports, May 4, 1923, p. 411.

embraced the opportunity to extend their activities into the field of commercial arbitration.[1]

§3. The Settlement of Disputes Among the Associates

In an examination of the arbitration activities of trade associations, it is essential to distinguish between two types of trade organization. There are some associations which include in their membership persons and concerns representing successive stages in the process of fabricating and distributing a given product or a group of related products. The members of these associations, therefore, habitually deal with one another, and the disagreements and disputes which arise are confined, in large measure, to parties within the immediate and direct jurisdiction of the trade organization. Under such circumstances the establishment and administration of machinery and regulations governing commercial arbitration is a relatively simple matter. But the vast majority of trade associations are composed of persons and concerns having a like relation to a given market, as buyers or sellers, and transactions between the associates are not part of their normal course of dealings. The commercial controversies of the members of these associations are generally with outsiders, therefore, and the problem arises of inducing parties beyond the direct jurisdiction of the association to submit their claims to the judgment of a tribunal which functions under the auspices of an organization representing their opponents in interest. Under these circumstances mere agreement among the associates upon the principles and machinery of commercial arbitration is not sufficient. The co-operative activity of these associations must comprehend educational efforts directed to the establishment, in other branches of the trade, of confidence in their good-will and an adequate appreciation of the advantages of the arbitration process; or joint arbitration arrangements must be set up between related associations.

[1] For a list of the more important national trade associations which have adopted arbitration systems, see Franklin D. Jones, "Trade Association Activities and the Law," New York, 1922, p. 194. For a statement of standard principles and rules for the conduct of arbitration proceedings, as recommended to trade associations by the United States Chamber of Commerce, see "Trade Association Activities," Department of Commerce, Washington, 1923, pp. 99–104.

The experience of the Silk Association of America may be presented as an illustration of the arbitration activities of the first type of trade association. Since 1898 this comprehensive organization, representing 90 per cent of the silk industry in all its branches, from the importers of raw silk to the factors and wholesalers distributing finished pieces, has had its Arbitration Committee actively promoting the settlement of commerical controversies without litigation.[1] This committee nominates a standing "List of Official Arbitrators," from which at least one person is required to be chosen on any board of three arbitrators selected to act in a dispute submitted for settlement under the rules and regulations of the association. Parties consenting to submit a cause to arbitration formally attest their agreement to arbitrate and to abide by the terms of the award reached, in accordance with the rules fixing procedure, and indicate their respective choices of an arbitrator. The third arbitrator is selected by the two thus chosen by the disputants (assuming they qualify), or, in the event of their failure to agree, by the Arbitration Committee of the association. After a hearing upon due notice to both parties, at which witnesses may be called but from which legal counsel are excluded, the decision of the majority of the arbitrators becomes a binding award. Under the New York law this award may be entered as a judgment of the Supreme Court of the State and enforced as such. In other jurisdictions the award when made, though binding under certain circumstances, may be enforced only by appropriate action in the courts as for a liquidated debt due and payable.[2] In the twenty-five years of arbitration experience in the silk industry, 158 cases have been decided, 13 of which were disposed of in 1923.[3] Through the practice of publishing in the annual report of the associa-

[1] See "Arbitration Manual," Silk Association of America, New York, 1923.

[2] In most American jurisdictions a "covenant to arbitrate" is not enforceable and is not a bar to an action brought upon the principal contract. Once an arbitration has been had and an award made, however, the courts will uphold the award in a suitable action, provided the proceedings have been conducted in accordance with certain standards of the common law. See J. H. Cohen, "Commercial Arbitration and the Law," New York, 1918, pp. 226–252; and Franklin D. Jones, "Trade Association Activities and the Law," New York, 1922, p. 211.

[3] See Fifty-Second Annual Report, Silk Association of America, New York, March, 1924, pp. 31–40.

tion an epitome of each submission and award made during the year, there is gradually being developed in the industry a body of precedents which help to clarify the legal consequences of the day to day transactions of silk merchants and manufacturers.

Other examples may be cited of a considerable development of arbitration activity within the ranks of broadly inclusive trade associations. The Rubber Association of America maintains a standing Committee on Arbitration composed of seven members.[1] The duties of this committee are very similar to those of the Arbitration Committee of the Silk Association, save that the committee of the Rubber Association is charged with the appointment of the arbitrators, and that appeals to the committee are allowed from the findings of the arbitration award.[2] The American Spice Trade Association also includes in its membership representatives of several successive divisions of the trade, and it has organized a Contracts Committee which has "general charge of questions referring to Spot and Future Contracts, Weights, Tares, Deliveries, Packages, Sampling, and Rules and Regulations governing transactions and the conduct of arbitrations between members of this Association."[3] Uniform Contract forms have been established. The contract rules settle questions of doubt as to trading practice and customs, and require that any dispute must be arbitrated. Each disputant appoints a disinterested member of the Association as his arbitrator and the two arbitrators select a third member to act as umpire. Should either disputant neglect to appoint an arbitrator within a specified period, the president of the Association is empowered to make the appointment. Appeals from the awards rendered may be carried to a trade tribunal known as the Arbitration Committee which constitutes essentially a court and is entirely divorced from the executive functions of the Contracts Committee. Although a relatively small trade, many specialized products are handled and the questions of quality and trade

[1] Year Book, Rubber Association of America, New York, 1923, pp. 7–8.

[2] *Ibid.*, 1918, pp. 63–73.

[3] See By-Laws of the American Spice Trade Association, Art. VIII, Sec. 2, Handbook of the Association for 1923, p. 14.

practice which constantly arise are by no means suited to adjudication by courts of law. For this reason the arbitration procedure has been highly successful since its institution with the organization of the association in 1907. During the association's fiscal year 1923 sixty-eight cases were arbitrated.

§4. The Settlement of Disputes with Outside Parties

The generality of trade associations, however, are not in position, by themselves, to foster arbitration proceedings as effectively as those just described. Their members seldom have dealings among themselves, all the associates being, for the most part, either buyers or sellers in the same markets. In most instances, therefore, only one of the parties involved in a commercial dispute is directly subject to the jurisdiction of the association. It is open even to such groups, however, to put forth co-operative efforts towards the avoidance of litigation, by stimulating the inclusion in the contracts of the associates with non-members of clauses providing for the submission to arbitration of all disputes that may arise over the terms or performance of each agreement. The development of such a practice, or of the alternative policy of offering to submit to arbitration issues which have actually arisen, tends to curb business chicanery and to advance legitimate trade through the evidence it affords of integrity and good faith. The American Wholesale Coal Association and the National Association of Finishers of Cotton Fabrics exemplify the benefits to be derived from educational efforts of this character.[1] But even trade associations of this type may go much further in their arbitration activity.

The opportunity, in these circumstances, to promote the settlement of commercial disputes without litigation may be greatly enhanced by co-operation with other trade associations representing related branches of industry or trade. Through the joint sponsorship of arbitration rules and machinery by several such associations, an entirely healthy pressure can be exerted on both sides of regular commercial

[1] See "National Trade Associations," *op. cit.*, pp. 59, 83.

transactions to adopt and abide by covenants to arbitrate disputes which may arise from disagreements as to the rights and obligations of the parties. In this way a situation may be created which corresponds very closely to that prevailing in the case of a trade association which, by the very scope of its organization, encompasses persons and concerns engaged in various stages of the producing and marketing process. Several notable instances of this mode of procedure may be described very briefly.

In the shoe industry there has been established joint arbitration machinery by the National Boot and Shoe Manufacturers' Association, the National Association of Shoe Wholesalers, the National Shoe Retailers' Association and the Tanners' Council of America.[1] The presidents of these associations constitute a Council of Arbitration, to which a member of any of the four organizations may submit a controversy which he has been unable to adjust with any concern in the collective membership. In the event of the two or more disputants reaching an agreement to arbitrate, they may jointly apply for the appointment of an arbitrator or arbitrators by the Council. As a means of pressure toward the utilization of this machinery, one of the associations participating in the plan has authorized the publication in its official bulletin of the name of any member refusing "without justifiable reasons" to arbitrate a controversy which the other party has offered to submit to arbitration. This disciplinary measure tends to exert considerable influence in bringing about general compliance with requests for arbitration. In any case this joint arbitration procedure appears to have gained the confidence of business men in the several branches of the shoe trade. There were upwards of fifty disputes submitted to the Council of Arbitration during 1922, and the work of the Council is steadily growing.[2]

The motion picture industry, because of the peculiar difficulties encountered in the valuation of films and the frequency of negotiations, presented a special need for the

[1] For the text of the standard procedure adopted by these associations, see "Trade Association Activities," Department of Commerce, Washington, 1923, pp. 104–107.

[2] Proceedings of the Nineteenth Annual Convention, National Boot and Shoe Manufacturers' Association, January, 1923, p. 68; January, 1924, p. 55.

development of the arbitration process. Accordingly, through the co-operation of the Motion Picture Producers and Distributors of America and the Motion Picture Theatre Owners' Chamber of Commerce, Arbitration Boards were established in 1923 in thirty-one distributing centers throughout the United States.[1] Three members of each Board are elected by the Film Board of Trade, composed of the branch managers of the distributors in each center, and three are chosen by the district organization of the exhibitors. There is a provision for the selection of a seventh member by an Arbitration Board in the event of a deadlock. "During the first year of operation . . . these Arbitration Boards have heard, decided and disposed of more than five thousand cases. . . . The percentage of unanimous decisions in these five thousand cases was a fraction better than ninety per cent. . . In twenty-two cases only was the seventh arbitrator called in."[2] No provision is made for appeal, but a remarkably small amount of litigation has followed this arbitration procedure.

In the grocery trade, too, there has existed, since 1913, appropriate joint machinery for the out-of-court settlement of commercial controversies. The Dried Fruit Association of California, and those of New York, Chicago and St. Louis, the National Canned Foods and Dried Fruits Brokers' Association, the National Canners' Association, and the National Wholesale Grocers' Association have made available joint arbitration boards in strategic centers for the dispatch of commercial disputes arising between members of their respective organizations.[3] The report of the Arbitration Committee of the Grocers' Association for 1923 announced that

[1] Address by Charles C. Pettijohn at Second Annual Dinner of the Arbitration Society of America, May 6, 1924. Published by the Society, New York, 1924, p. 3. It may be observed that the establishment of this arbitration machinery followed the appointment in 1922 of Mr. Will H. Hays as Director-General of the motion picture industry and was in considerable measure due to his influence. The new position was created in part to foster public good will or to obviate public criticism and unreasonable exactions. Judge Landis, appointed as baseball commissioner in 1921, following the scandal connected with the preceding world's series, serves in a similar dual capacity as umpire in important disputes and as a quasi-public conservator of baseball morals. In the case of both motion pictures and baseball, they cannot thrive without public confidence.

[2] *Ibid.*, pp. 3–4. See also *Arbitration News*, June 1924, p. 1.

[3] See Dunn and Dimond, "Commercial Arbitration," San Francisco, 1922, p. 299.

the association was represented on standing arbitration committees in twenty-eight markets. During the year 1923 fifty-seven submissions had been disposed of, as compared with forty-six decisions rendered in 1922. The report notes that "in the great New York market the policy of arbitration of all controversies has grown tremendously during the past year—in fact, more than doubled. Disputes involving about twelve million dollars, arising out of cancellation of contracts between English manufacturers and merchants of this country, recently were settled through arbitration." And the committee concludes in this enthusiastic strain: "When we consider the rapid growth of this method of settlement of trade disputes, it is safe to say that within the near future practically all commercial disputes in this country will be settled by arbitration instead of resorting to the delay and heavy expense incident to legal action and recourse to the courts."[1]

§5. The Voluntary Character of the Arbitration Process

It may be noted, finally, that from the very nature of the matter an agreement to submit to private arbitration disputes over legal rights and obligations must be wholly voluntary in every instance. No general undertaking to resort to the arbitration process in the settlement of controversies which may arise out of contracts to be negotiated in future can be enforced in the courts. Nevertheless, some trade associations have ventured to make commercial arbitration as compulsory as lies within their power, by stipulating, directly or indirectly, that membership shall be contingent upon the willingness of the associate to forego resort to the courts for the enforcement of contested issues arising out of business dealings. The By-Laws of the National-American Wholesale Lumber Association, for example, provide that "In case of a dispute between members of this Association or between a member of this Association and a member of another recognized lumber or other trade association arising out of the purchase or sale of lumber or other forest products,

[1] Proceedings of National Wholesale Grocers' Association, New York, 1923, pp. 41–42.

either party may demand and shall be entitled to an arbitration of such difference upon request, in writing, to the Association and upon signing an arbitration agreement." There are three exceptions to this requirement: (1) lumber inspections; (2) disputes previously arbitrated; (3) disputes arising prior to membership. The Association By-Laws authorize the Directors to expel members refusing to arbitrate.[1] A similar method of fostering arbitration has been followed by the Interstate Cotton Seed Crushers' Association, and the elaborate system of arbitration machinery set up in that industry has been widely used.[2] While coercive measures may encourage submission to arbitration in particular instances, and appear to have operated very successfully in the cases cited, the most lasting benefits are likely to flow from educational methods which impress upon the participants in the trade a vivid realization of the burdens and frequent futility of litigation, and of the simplicity and ultimate advantage of arbitration as an alternative process of settling commercial disputes. Trade associations afford a ready means both for the exertion of this educational influence and for the establishment of the necessary instrumentalities of arbitration procedure.

[1] By-Laws of National-American Wholesale Lumber Association, March 20, 1924, Art. XVII, p. 17.

[2] "National Trade Associations," *op. cit.*, p. 79.

CHAPTER XXI

REPRESENTATION IN PUBLIC MATTERS

The entire range of association activities which have been surveyed in this Fourth Part will, upon reflection, be found to relate to the achievement of one or both of two ends: the enhancement of efficiency in producing and marketing processes, and the circumvention of certain barriers which obstruct the fluid adjustment of economic relationships. In many fields the intelligence and effectiveness of business conduct can be measurably increased through the co-operation of independent business enterprises. The fruits of co-operation in commercial and industrial research, in the establishment of cost accounting systems, in the use of publicity, in the provision of protection against risks, in the adjustment of transportation matters, in the improvement of employment relations, and in the arbitration of business controversies tend to manifest themselves in lower manufacturing, distributing, and administrative costs for the associates, and to redound to the ultimate benefit of the consuming public. But the advantages of such co-operation are not confined to the enhancement of the efficiency of the individual business unit. The effective functioning of competitive forces is also promoted thereby. The uneven advance of technical progress, the inadequate knowledge of costs of production, the insecure hold upon demand, the imperfect provision against insurable hazards, the maladjustment of railroad rate and service relationships, the instability of employment relations, and the vexatious methods of settling trade disputes—all these difficulties, which business co-operation seeks to mitigate, constitute obstacles to the maintenance of that flexible adjustment of economic forces which competition tends to effect, but which can be realized only in the long run, and frequently at great social cost, through exclusive reliance upon competitive rivalry. The various trade association activities which have been analyzed

and described in the preceding pages serve to facilitate the removal of these barriers to the free play of competitive relationships, as well as to increase the productive efficiency of the associated enterprises. They constitute a solid contribution, therefore, to the maintenance and vigorous development of that system of industrial organization which it has long been the object of public policy to foster and protect.

§1. The Significance of the Relationship Between Government and Industry

Most of the business difficulties to which attention has been directed have sprung from the internal shortcomings of individual enterprises in a given industry, particularly of those operating on a small scale, and from maladjustments in their dealings with outside parties, such as railroads and insurance companies. The relations between an industry and the government, as already disclosed in transportation and traffic matters, may likewise constitute a source of inefficiency and friction tending to impair the range of the industry's service and the vitality of its competitive power. Under the complexities of modern economic conditions, the legal environment within which business enterprise functions, no less than the state of industrial technique or commercial organization, exerts an important influence in shaping its character and development. The great accumulation of public measures of direct or indirect economic significance, and the constant agitation for their radical change or tentative modification which characterizes the current political ferment, are of continuously vital concern to the business world. The unexercised possibilities of governmental power are fraught with even more far-reaching consequences, good or ill, both for specific trades or industries, and for the future status of the prevailing economic order.

It goes without saying that blind indifference to the attitude and action of those entrusted with political authority is much less likely to promote either the general welfare or the legitimate ends of special groups than constant watchfulness and the vigorous and responsible assertion of all demands which reflect the interests of the component elements of the community. It is essential, in a democracy, that partici-

pation in public affairs be not confined to the mere exercise of the suffrage in the selection of public officials. The interests of the citizenship, however diverse and conflicting, must be constantly impressed upon the governmental authorities, if political processes are to be representative in action as well as in form. For such effective participation in government, it is necessary that the demands of all legitimate interests be definitely articulated and responsibly presented. This means organization. In economic matters it opens up a fruitful field of activity for trade associations.

§2. The Representation of Business Interests Before Public Bodies

It is true, of course, that tremendous difficulties are involved in harmonizing the demands of general and special interests, and that the opportunities for abuse are frequent and far-reaching. Efforts by *ex parte* organizations to influence the action of public authorities are not always calculated to advance the common good. There is need of eternal vigilance against improper pressure. But experience has revealed no way of completely blocking evil designs without thwarting freedom and progress. In the last analysis, in addition to constitutional safeguards, the cleansing character of publicity and the basic soundness of the moral fibre of the people and their representatives must be relied upon, under democratic institutions, to prevent the perversion of legislative and administrative processes.

The traditional, and probably still the largest, field of activity for a body representing a given trade or industry with reference to public matters is centered in influencing legislation. Certain statutes, such as inspection laws fixing minimum standards for specific products and technical enactments regarding safety and sanitation, obviously possess special importance for particular industries. Tariff legislation, while possessing much broader significance, is necessarily concerned, in its various schedules, with the conditions under which particular trades or industries shall be conducted. Transportation laws and labor enactments, both state and federal, are generally much wider in their scope, but not infrequently these types of legislation also

involve regulations and adjustments which operate to the undue prejudice or advantage of those engaged in special lines of economic activity. In the case of many measures the interests to be protected or promoted comprehend those of business enterprise in all its aspects; but legislation touching commerce and industry, because of constitutional limitations, seldom if ever deals with units of smaller compass than a whole trade. Accordingly, the individual directors of commercial or industrial enterprises within a given branch of trade generally find substantial identity of interest in initiating, supporting, or opposing proposed legislative action. Since the force of their approval or disapproval is roughly proportionate to the scope of the business interests which they represent, it is manifest that a comprehensive organization like a trade association is an agency through which the position of the industry may be set forth with marked influence and authority. Moreover, only through co-operative efforts is it feasible to assemble and present adequately the factual data which are coming more and more to be recognized as an indispensable accompaniment to responsible expression of opinion. The loose assertion of judgments and preferences, supported only by vague impressions and the urge of self-interest, is growing to be steadily less influential in the shaping of public policy. The exertion of private influence in the formulation of legislative measures, if it is to be effective as well as legitimate, must be grounded in careful fact-finding and in the open presentation of widely representative views. At least as far as the peculiar problems of particular industries are concerned, trade associations serve as a useful instrument for such representation in the enactment of legislation.[1]

Many, if not most, trade associations have legislative committees performing for their membership some measure of

[1] *Cf.* the following from "Trade Association Activities," Department of Commerce, Washington, 1923, p. 44: "A trade association is peculiarly well fitted to collect, digest, and present facts upon which legislation affecting the industrial or commercial group it serves may be predicated. It is also in a position to discourage the enactment of laws that would be inimical, unwise, or manifestly unsound. Acting for and representing a comparatively large number of units, with unusual sources of information at its command, and voicing the collective mind of its membership, the trade association is accorded a consideration in legislative matters that is infrequently given to the individual."

service in connection with legislation affecting their special interests. In some instances this service is largely confined to keeping the associates informed of the course of legislation. This emphasis is illustrated by the activities of the Associated General Contractors of America, the Millers' National Federation, and the Railway Car Manufacturers' Association.[1] But the representative function in matters of legislation is generally extended to the exertion of influence upon public authorities on the basis of the collective needs and wishes of the industry. Numerous associations, among them, for example, the Manufacturing Chemists' Association and the National Confectioners' Association, have made themselves felt actively and continuously in the shaping of public measures, pending or proposed, which touch their particular spheres of commercial or industrial activity.[2] But the most effective results in this direction have been attained by the larger and more powerful associations, which maintain facilities for the regular assembly of basic technical and economic data and provide resources for the conduct of such special investigations as may be deemed necessary. Among the more important of these associations may be mentioned the National Lumber Manufacturers' Association, the Portland Cement Association, the Silk Association of America, and the National Coal Association.[3] The types of legislation

[1] See "National Trade Associations," *op. cit.*, pp. 68, 120, 214. The Associated General Contractors of America, Incorporated, is reported to have "made and published analyses of bills relating to immigration, housing, public works, water power, highways, government contracts, railroad legislation, taxes and tariff."

[2] See Annual Report, Executive Committee, Manufacturing Chemists' Association of the United States, 1923, pp. 4–10, and *Ibid.*, 1924, pp. 8–16, dealing with the activities of the association in tariff matters, proposed patent legislation, stream pollution legislation, prohibition amendments, commercial bribery legislation, and in connection with the "Caustic Acid Bill" and the proposal for government merchandising of nitrate of soda; and see Proceedings of the Fortieth Annual Convention of the National Confectioners' Association of the United States, 1923, pp. 43–48, dealing with the activities of the association in such miscellaneous matters as the proposed repeal of the excise tax on candy, the lowering of import duties on almonds, walnuts, and other raw materials of the industry, the prevention of state sales taxes on candy, the defeat of a Wisconsin measure requiring "manufacturers to quote the same prices to jobbers as to retailers and consumers," and the enactment of a North Dakota statute "which amends the Food Law of that state by repealing that part of the law requiring the use of vegetable colors in food products."

[3] See Franklin D. Jones, "Trade Association Activities and the Law," New York, 1922, p. 240: The "comprehensive organization and presentation of business and economic data" by associations of this character "has repeatedly been the means of preventing the enactment of unwise legislation, of defeating harmful regulations, and of saving their industries large sums of money."

encompassed by the legislative activities of trade associations are as numerous and varied as the interests of their membership. Although the measures generally enlisting their cooperative support or opposition may be classified under a few general heads, such as the tariff, transportation, labor, taxation, and public control of industry, they comprehend almost every conceivable enactment of economic significance. The emphasis of each association is upon those aspects of public policy which vitally concern the affairs of its membership.[1]

The growth of the administrative branches of government, both state and national, has greatly augmented the opportunities for effective activity by trade associations in their representative capacity. Such bodies as the Interstate Commerce Commission, the Federal Trade Commission, the Tariff Commission, and the Bureau of Internal Revenue, to mention only some of the more important federal agencies, prescribe rules and regulations, in the exercise of the powers conferred upon them, which are frequently as significant for entire trades or industries as acts of Congress. While the orders of commissions and administrative bodies are in many cases framed with reference to the specific circumstances of particular parties, they commonly reflect policies which ultimately come to be felt in the affairs of every firm in the same industrial group or line of trade. Moreover, many of their rulings and decisions are, by their very terms and scope, of general applicability. Constant contact with these agencies, therefore, is but a means of supplementing the legislative efforts of trade associations in matters of traffic and transportation, trade practices, import duties, and taxation.

[1] The activities of trade associations in matters of transportation are frequently pursued through their traffic bureaus, as noted in earlier pages, as well as through legislative committees. Associations representing industries in which transportation costs are particularly significant place special emphasis upon this field of legislation. The National Association of Farm Equipment Manufacturers, the National Coal Association, the Grain Dealers' National Association, and the National Lumber Manufacturers' Association may be cited as examples. Associations representing industries which import raw materials or the products of which compete with those of foreign countries lay special stress on tariff adjustments. As representative of the associations which maintain a vigilant interest in matters of tariff legislation may be mentioned the National Association of Cotton Manufacturers, the American Drug Manufacturers' Association, the Rubber Association of America, the National Ornamental Glass Manufacturers' Association of the United States and Canada, the American Hardware Manufacturers' Association, and the Silk Association of America.

§3. The Machinery of Representation in Public Matters

As has already been suggested, the function of presenting the views and defending the interests of specific industries in connection with the formulation and administration of public policies is generally performed by regularly constituted legislative committees of trade associations, operating under various designations. In the more highly developed associations these committees are usually clothed with ample power and provided with adequate facilities to render their representations as effective as possible. In the case of the Silk Association of America, for example, it is provided that "It shall be the duty of the Committee on Legislation to keep informed of all measures affecting the silk industry that may be proposed in legislative bills or enacted by state legislatures or Congress; to secure copies thereof, and report thereon to the Board of Managers whenever, in their opinion, it becomes necessary. The said committee shall take into consideration the impartial execution of revenue laws, and hear, and report on, complaint of any evasions thereof, and subject to the approval of the Executive Committee, shall represent the Association in all legislative matters affecting the welfare of the silk industry."[1] The National Association of Farm Equipment Manufacturers, in similar fashion, pursues its legislative activities on an extensive scale. "A division is made between national and state legislation. The National Legislation Committee gives its attention to matters before Congress, and has been alert and aggressive in acting promptly on all matters affecting the interests of the membership. The division of the State Legislation Committee into the separate committees for each state has enabled the resident members of the respective states to take action on proposed legislation more promptly and with better success in heading off or amending drastic, confiscatory

[1] By-Laws, Silk Association of America, Art. XII, Sec. 11, Fifty-First Annual Report, 1923, p. 24. See also Constitution and By-Laws, Grain Dealers' National Association, 1920, Art. IV, Sec. 6 (4), which defines the duties of its Committee on Legislation in the following blanket terms: "It shall be the duty of this Committee to advocate, by all lawful means, the passage of such legislation as may be beneficial to the interests of the members of this Association, and to prevent, by all lawful means, the enactment of legislation prejudicial to the interests of its members."

laws."[1] But the representative function is not entirely delegated to the standing legislative committees. There are many matters of general public interest in which associations have no occasion to become intimately involved, but toward which an expression of approval or disapproval is deemed expedient. The usual course, in these circumstances, is for the association as a whole to adopt resolutions which declare the sense of the organized trade.[2] Occasionally, also, special committees are appointed to deal exclusively with particular designated matters. This procedure may be followed because of the extraordinary significance of the problem under consideration, because of the exceptional competence of some member or members not upon the regularly constituted committee, or because of the unusual burdens which proper representation in the matter might involve.[3] Such other variations as frequently occur in the performance of the representative function—manifesting themselves, for

[1] From address of Executive Chairman, National Association of Farm Equipment Manufacturers, Proceedings, 1923, p. 20. Note also the following from the President's Address, *ibid.*, 1921, p. 11: "In all national legislative matters in which the Association has interested itself since its last annual meeting, formal declarations, in writing, expressing its attitude thereon, have been filed with the proper Congressional Committees, cabinet officers and in some instances with the President of the United States."

[2] In some instances these resolutions strengthen the hands of government agencies in executing independently formulated policies of direct concern to the particular trade. For example, among a number of resolutions adopted by the National Lumber Manufacturers' Association at its convention in 1922 (Proceedings of Twentieth Annual Meeting, 1922, p. 57), appeared the following: "Whereas—the Forest Service, United States Department of Agriculture, purposed the publication of a pamphlet on the use to which uneven lengths, short lengths, and lower grades of lumber can be put, to the end of reducing construction costs as well as of conserving the country's supply of lumber; and Whereas—the whole lumber industry is directly interested in aiding in the conservation of timber, the closer utilization of timber, and the reduction of construction costs to the house-owner; therefore, be it Resolved—that the National Lumber Manufacturers' Association endorses the compilation and publication of such data by the Forest Service in order that the producer and consumer of lumber may benefit alike." On the other hand, many trade associations, in convention assembled, take advantage of this method to express their feelings upon the most diverse public issues, and sometimes without adequate study or appreciation of the broader social and economic interests involved.

[3] The American Boiler Manufacturers' Association, at its 1922 convention, appointed a special committee to co-operate with the Smoke Prevention Association, for the purpose of standardizing the dimensions of combustion chambers, so that the varying requirements of local smoke inspectors might not continue to impose undue burdens upon boiler manufacturers. This was but an alternative to dealing directly with many scattered, often inexperienced, and occasionally unreasonable municipal office-holders. The task has proved to be a formidable one, and the committee is still functioning. See Proceedings, American Boiler Manufacturers' Association, 1922, pp. 84–85; *ibid.*, 1923, pp. 59–60; and Proceedings of Semi-Annual Meeting, Feb., 1924, pp. 20–28.

example, in legislative activity by the general executive officers of the association or by standing committee having jurisdiction over special fields of co-operative action—are likewise based upon the specific interests and circumstances of the particular association.

Through numerous paths and in a great variety of directions, then, trade associations are constantly endeavoring to shape the policies of government—national, state, and local. They seek primarily, if not exclusively, to further their own ends—to free the industries under their jurisdiction from what they deem to be oppressive governmental burdens, and to stimulate the prosperity of their membership. These activities frequently enhance the efficiency of producing and marketing processes, and serve to remove artificial barriers to the development of individual initiative and the free play of competitive enterprise. And although they are subject to abuse—through undue emphasis upon immediate self-interest, through lack of social vision, and through the occasional utilization of methods that border upon illegitimate, if not unlawful, lobbying and propaganda—they serve on the whole to assist the public authorities in acquiring an understanding of the complexities of economic relationships and of the professed needs and responsible outlook of those engaged in the management of particular trades or industries. While the ultimate responsibility for governmental action, legislative or administrative, rests with the public authorities, the definite articulation and presentation, on a representative basis and with reliable supporting evidence, of the *ex parte* views of the various interests affected by pending or projected measures, constitutes an enlightening and useful factor in the formulation and enforcement of public policy. In a democratic society it would be hardy to deny trade associations this freedom of expression, or to deprive the community of the benefits accruing therefrom in shaping the legal environment of business enterprise.

PART V

CONCLUSIONS

CHAPTER XXII

THE PLACE OF TRADE ASSOCIATIONS IN THE INDUSTRIAL STRUCTURE

In bringing to a conclusion this study of trade associations and their activities, it will be necessary to gather the scattered threads of the inquiry, from the standpoint both of economic principles and legal doctrines, and to appraise the significance of the results, with special reference to their bearing upon the development of public policy toward business co-operation. In a large way it may be said that this investigation has been chiefly concerned with the applicability to trade associations of the prevailing legal doctrines and enactments which are directed toward the maintenance of competition in modern industrial society and of their soundness in that field of application. It is true, of course, that the full scope of the anti-trust laws has not been brought under review, nor has the entire field of their application been examined. No attempt has been made, for example, to survey comprehensively, and for their own sake, the work of the Federal Trade Commission, and the decisions of the courts, in the regulation of competitive practices. Similarly, the attitude of the law toward the actual merger of numerous independent establishments into vast consolidations or so-called trusts has been given but scant and incidental attention. These matters, while closely related to the problem of public control of business co-operation, are without the primary scope of this inquiry. But it has been pointed out, concretely and at length, how in a great variety of ways business enterprises have sought to shape the conditions and methods of their commercial and industrial rivalry through association and co-operation in trade bodies. These relatively new developments in the sphere of business organization have raised the question of the expediency and sufficiency of the traditional policies of the law for dealing with market relationships. Have the legal doctrines

designed to foster competition in trade and industry proved too inelastic to sanction co-operative efforts which experience and analysis stamp as salutary? Or have these legal doctrines proved impotent to frustrate association activities which tend to benefit narrow and select groups at the expense of the general interest? In the foregoing pages an attempt has been made to determine the economic character and significance of the various efforts put forth by trade associations to regulate the competitive operation of business enterprise, as a means of rendering it more orderly and more fruitful. But this analysis has at every stage been definitely related to what the law sanctions and what the law condemns. In connection with each of the numerous functions performed by trade associations, therefore, a conclusion has been ventured both as to its legitimacy, in the light of prevailing public policy, and as to its desirability, in the light of economic principles. When these two points of view have led to divergent judgments, the conflict has been duly noted.

§1. The Basic Advantages of the Competitive System

On the economic side, the course of this inquiry has served, first, to confirm the reality of certain fundamental advantages which flow from the competitive management of productive resources in the various lines of economic activity, and second, to reveal certain disadvantages which inhere in the maintenance of complete independence among competitive business units. In other words, it appears that while there is ample ground for maintaining the competitive system of industrial organization and control, there is also a clear need, in many directions, of supplementing this system, as it actually functions, by resort to co-operation. The basic merits of the competitive system thus disclosed manifest themselves in its general tendency to promote individual freedom, to lend flexibility to the adjustment of productive processes and economic relationships, and to safeguard the public interest against private exploitation. The essential character of these advantages will first be briefly described. Then will be noted the primary disadvantages which flow

from exclusive reliance upon unco-ordinated competitive rivalry, and which constitute an economic warrant for the growing tendency toward business co-operation.

In the first place, the competitive system involves the recognition and maintenance of individual freedom. Competitive adjustments are based upon the free expression of economic wants and upon freedom of enterprise in their satisfaction. Effective demand in the market serves as the controlling guide of productive activity, and each business unit is free, upon its own initiative and at its own risk, to apply its resources to the production and sale of such goods or services, both in character and quantity, as it deems to be profitable. The competitive industrial system assures men of the opportunity to apply their talents in whatever sphere they may individually choose. It allows them to search out the tasks for which they are best adapted, and at the same time it warns them against remaining in pursuits to which they are not adapted. It tends to penalize and ultimately to submerge the economically unfit. But the principle of freedom, grounded in the institutions of private property and contractual liberty, permeates the entire system. The pressure of authority, both public and private, is reduced to a minimum. Moreover, this emphasis upon individual freedom is in general harmony with prevailing social ideals and accepted political doctrines. Such harmony of outlook in the organization and conduct of industry, of government, and of the numerous other forms of social intercourse is at once indispensable and inescapable. The various phases of organized social life cannot be maintained in isolated compartments. On the whole the undoubted trend of social evolution, in all its aspects, has been from status to contract. The ideal of freedom has so thoroughly impressed itself upon all sections of modern society, particularly in the western world, that it is not feasible, at this time, to organize industrial processes upon any other principle than that of economic liberty. The incongruity of imposing an authoritative discipline for the exploitation of productive resources in a society which tolerates no established Church and guards itself jealously against the power of government is readily apparent. In the United States,

despite the need of voluntary co-operation in some directions and of government regulation in many others, no system of industrial control is likely to be workable, for the present, which is not grounded in individual initiative and private enterprise.

The flexibility which characterizes the functioning of competitively organized industry constitutes the second of its outstanding advantages. The competitive system possesses marked capacity for the quick and easy adaptation of productive processes and economic relationships to the dynamic conditions of modern life. Through the multiplicity of its operating units, and through its comparative freedom from external authority, it provides the maximum of responsiveness of productive operations to the changing requirements of consumers. The spur of competition also induces constant scrutiny of the sources of raw materials, and leads to the sensitive adjustment of production policies to the changing conditions of the basic industries. But the most significant way in which the advantages of flexibility under the competitive system of industrial control manifests itself is through experimentation in productive processes. Such experimentation leads to technological progress and to improvements in administrative machinery. The pressure of self-interest among numerous independent producers and sellers stimulates unending variation in manufacturing and marketing methods. New devices and new arrangements are constantly being introduced. The comparative value of alternative methods, as tested by results, is the determining factor in shaping the character of industrial technique and commercial practice. This process of experimentation seeks to increase productive efficiency. It represents the concrete functioning of the principle of progress in the organization and management of economic resources.

The third of the outstanding advantages which, under the régime of private enterprise, spring from the maintenance of a system of industrial control in which the direction of economic activity rests in the hands of rival producers and sellers, is to be found in its tendency to protect the consuming public against exploitation. Competitively determined

prices tend to be reasonable prices. They are the resultant of the free operation of the forces of supply and demand. They gravitate toward costs of production. The pursuit of competitive advantage provides an automatic safeguard against the use of private power for purposes of public oppression. It is doubtful whether any system of monopolistic control could furnish equal protection against exploitation of the many for the benefit of the few. The possession of arbitrary power to manipulate whole industries is a constant source of danger to the public interest. If that power were centered in private hands, there would be no basis in experience for any degree of confidence in its beneficent exercise. In these circumstances, only governmental price-fixing, and like measures, groping over an uncharted field of political action and bristling with difficulties, would hold forth any promise of safeguarding the public welfare. But even the collective exercise of monopolistic power by a body of public authorities—almost necessarily, under our democratic form of government, of changing personnel and of largely political qualifications—would not be free from the danger of serious abuse. In any case, under the prevailing system of private enterprise, the maintenance of competitive conditions provides the most effective mechanism for the protection of consumers against the power of producers.

§2. The Outstanding Defects of Unco-ordinated Competitive Rivalry and the Functions of Business Co-operation

While these merits of the competitive system are substantial and incontestable, they merely represent general long-run tendencies. There are certain counteracting weaknesses in the practical operation of industry on the competitive basis. These weaknesses, in various guises, have been noted repeatedly in the course of the foregoing pages. In part they spring from the inability of the law to assure the maintenance of free and fair competition in trade and industry, despite the expanding scope of statutory and administrative regulation and the vigilance of prosecuting authorities. The cloak of "co-operation" may be used to

shield restraints upon trade; and overreaching business tactics may be employed to destroy competitive rivalry. The efforts of the law to eradicate such business conspiracies and predatory practices can be substantially facilitated through the activities of trade associations. The development from within, of constructive business standards, in accord with the advancing ethical ideals of the community, can exert a pressure more potent than that of legal enactments in the maintenance of free and fair competition. But in considerable measure the defects of the competitive system are of another type; they do not spring from the mere shortcomings of law enforcement. They are grounded in the inherent nature of competitive organization and control, and would persist even under the most faultless observance of all the laws in the books. These drawbacks arise from unco-ordinated pursuit of competitive advantage. They tend to place small-scale producers at an unjustifiable disadvantage in waging what frequently proves to be an unequal contest with their powerful competitors. They manifest themselves in economic waste and industrial instability. They carry the competitive struggle to destructive lengths. Circumstances such as these provide a sound economic warrant for the pursuit of business co-operation through trade association activity. They point towards the need, for purposes of economic efficiency and industrial stability, and as a means of safeguarding the essential elements of the competitive process, of co-operative activity among trade competitors in various directions.

§3. The Legal Status of Trade Association Activities

The very freedom of action afforded by the competitive organization of industry opens the way to influences which may tend to frustrate the achievement of genuine economic liberty. Speaking broadly, the exercise of the privilege of self-direction in industry has come, in practice, to be rather narrowly restricted. But this larger problem of the concentration of wealth and the dominating influence of capital in the control of productive processes, under the system of free enterprise in modern industry is beyond the scope of

the present inquiry. But the development of large-scale enterprise and the growth of industrial combination within the lines of the capitalistic system tend to place the numerous independent small-scale concerns at a serious disadvantage in the struggle for trade with their powerful competitors. Through the co-operative efforts of trade associations many of the economies which inhere in concentration of production and control can be secured by the scattered small-scale enterprises. Notice has been taken of the influence upon economic efficiency of such association activities as negotiation of purchases, interchange of patent rights and of credit information, commercial and industrial research, education in cost finding, co-operative insurance arrangements, and the establishment of traffic bureaus. The result of co-operation along these and similar lines is to enhance the effectiveness of the economic freedom which characterizes the competitive system. Moreover, there are numerous competitive practices, involving chicanery, subterfuge, or downright fraud, whereby the liberty of actual or potential competitors is substantially curtailed. And though the policy of the law has been extended to the elimination of such "unfair methods of competition," experience has revealed ample room and urgent need for the voluntary banding together of scattered trade competitors for mutual protection. Through the development of business standards, for example, trade associations have been supplementing the legislative and administrative measures of government for the prevention of the ravages of commercial buccaneers.

The advantage of flexibility in competitively organized industry has its counterpart in the instability of the course of trade. At times and in places this instability approaches a condition of chaos. The operation of competitive enterprises without adequate knowledge of general market conditions can only lead to miscalculations in business policy and to recurrent maladjustments between supply and demand. And while such knowledge may not entirely relieve an industry or trade from the evils of cyclical fluctuations, it will certainly tend to alleviate them. The necessary business information cannot be assembled by individual concerns, in most instances, even when undertaken with the utmost

determination and the most elaborate facilities. In large part the essential data are beyond their reach. Under present circumstances, therefore, since the responsibility has not been assumed by government, the only alternative is to be found in the co-operative collection and dissemination of trade information, and trade associations have undertaken the development of this service on a considerable scale. But instability also arises from the competitive scramble for patronage, which tends to overemphasize the achievement of "sales contacts" and to neglect the cultivation of enduring trade relationships. In this direction trade associations have exercised a healthful influence through educational experiments in joint publicity, which may eventually lead to some diminution of the social burden of competitive advertising and of the wild orgy of salesmanship which serves to keep many markets in turmoil. The wasteful heterogeneity of products which spring from the freedom and flexibility of the competitive system constitutes another source of instability in the economic process. It narrows the market for each type of product, thereby increasing the violence of fluctuations in effective demand and rendering productive operations less regular. The growing efforts toward standardization, under trade association auspices, look to the mitigation of this evil, as well as to greater industrial economy, and within proper limits these efforts need not nullify the acknowledged advantages of permitting the character of industrial activity to be shaped by competitive forces.

Finally, experience has demonstrated that the advantage to the public of protection against exploitation which is afforded by the competitive system may be destroyed by the very energy and resoluteness with which the self-interest of independent competitors is pursued. The unbridled quest of trade advantage may readily generate such fierce rivalry that sense and prudence are thrown to the winds. Under these circumstances economic motives are subordinated to a primitive lust for conquest. While the immediate injury to such trade competitors as become embroiled in this warfare is not at once reflected in a detriment to the consuming public, in the long run the conduct of

industrial or commercial enterprises along these lines can lead only to business ruin. And notwithstanding the proscriptions of the law against market domination, the business ruin emerging from cut-throat competition generally leads to business mastery, in greater or lesser degree, to the ultimate jeopardy of the consuming public. Even more frequently, moreover, the pursuit of private advantage, in the face of actual or threatened competitive pressure, results in agreement or combination calculated to override the public interest in special fields. While the law forbids conspiracies to obstruct the free course of trade, the efficacy of exclusive reliance upon statutory prohibition and judicial condemnation of monopolistic arrangements is open to serious question. Legal principles cannot be stretched to invalidate all business combination, without greater injury than benefit to the public welfare, and the line between legitimate and illegitimate association cannot always be so clearly drawn and the requirements of the law so unfailingly enforced as to safeguard the public in all cases against monopolistic exploitation. The restraints of law, therefore, must be supplemented by the pressure of a collective responsibility and of an autonomous discipline within the ranks of each trade. While there may be some hazards connected with the growth of co-operation through trade associations, there are greater hazards in the policy of encouraging men to seek the maximum gains obtainable in industry without resort to force or fraud, and then closing to them the shortest and most obvious avenue to high profits by the mere legal prohibition of concert of action. The authoritative mandates of the legal rules which constitute our anti-trust policy must be reinforced by the voluntary cultivation of constructive business standards and a quasi-professional responsibility among the participants in each trade or industry. Only when the spirit of competition has been so transformed as to effect the abandonment of destructive tactics, and the collective outlook of those engaged in each field of productive activity has definitely repudiated all resort to restraint of trade and monopolistic control, can the public interest be effectively safeguarded through the operation of competitive forces.

§4. Internal and External Safeguards Against Restrictive Arrangements

Having noted the principal merits and defects of maintaining freely competitive conditions, as well as the nature of the advantages which tend to accrue from the co-operative activities of trade associations within the competitive organization of industry, it becomes necessary to indicate the significance of the various legal doctrines which embody the traditional public policy of fostering competition, as a means of determining how far they have proved or may prove to be adaptable to the advancement of sound and salutary business co-operation. In other words, an attempt will now be made to restate, in general terms, what the attitude of the law toward trade associations is, and what it may reasonably become. The basis and character of these conclusions have been developed at length in the course of the inquiry. It appears that there is a distinct place for trade associations and their activities within the framework of the law, as there clearly is in the industrial structure. Broadly speaking, when trade associations undertake to perform functions which infringe upon the area of legal prohibition, they are following a path which leads to no desirable economic end; when, on the other hand, they enter upon economically defensible activities, there is little danger of their being subject to legal attack. While it is the policy of the law to maintain competition, it appears that this policy has been, and may continue to be, adhered to without prejudice to the privilege of association in trade bodies for essentially sound and constructive purposes.

The primary objects of the traditional public policy toward the organization of industrial control may be said to lie in the preservation of private business enterprise and responsibility, and in the protection of the public against economic exploitation. Since these ends are in some respects conflicting, the great problem with which legislatures and courts and administrative agencies have long been struggling has been to harmonize economic liberty with public security. For the most part the achievement of this goal has been sought through the maintenance of competitive conditions.

This represents the essential purpose of the anti-trust laws. But their method of attack is largely negative in character. They seek to safeguard the public welfare by preventing the suppression of competitive conditions. Accordingly, they do not command individual economic isolation; they merely condemn conspiracies in every form calculated to obstruct the free course of trade. The distinction between unlawful conspiracy and legitimate co-operation is now uniformly recognized. The former represents an attempt to establish concerted control of manufacturing and marketing processes. The latter contents itself with concerted regulation of the conditions and methods of trade competition. So long as business competitors, through association, seek only to mould the character of the environment of business enterprise, and do not unduly restrict their own freedom of action within that environment, they are in complete accord with both the spirit and the letter of the law.

On this basis there is broad scope for trade association activity within the established principles of anti-trust policy. There is ample opportunity not only for co-operative efforts to increase economic efficiency and industrial stability in many directions, but also for the voluntary development of business standards and the autonomous regulation of commercial practices. In the latter respect trade associations may come to share with the government itself, as in the days of the mediæval guilds, the responsibility for eliminating unfair and predatory competitive conduct. There can be no legal objection against trade co-operation which seeks to accomplish one of the primary ends for which government regulation of business has been instituted. With regard to the opportunity for co-operative efforts to improve the efficiency and stability of productive and distributive processes, it is only upon a false construction of the policy of the law that such opportunity could be withheld. It would be a narrow and perverse attitude which denied the privilege of voluntary association for ends which promote the public welfare simply on the ground that the joint action might also bring private advantage to the co-operating associates. In general this is not the attitude of the law as interpreted by the courts. The anti-trust laws are directed against

restrictive arrangements—against association for private profit at public expense. The general policy of the law interposes no obstacles to the development of the constructive functions of trade associations. In its concrete application to the manifold varieties of association work in all the complexities of practical affairs, mistaken decisions may occasionally be made. It is a difficult task to apply legal rules to the ever-changing conditions of trade and industry, and judges are not infallible. But the principles of the law afford as wide a sphere for business co-operation as, upon the basis of economic analysis and practical experience, seems calculated to promote the public interest.

The limits of lawful co-operation through trade associations are obviously necessary limits. A competitive system of industrial control in which unbridled private freedom is not restricted by public authority tends, as we have seen, to defeat its own purposes, and may readily be turned into an engine of economic oppression. But it is equally obvious that these legal limits must in their nature be elastic. To attempt to impose rigid rules upon the complex and shifting circumstances of economic activity and business practice would probably work injury to private interests without promoting the public welfare. To lay it down as an inflexible rule, for example, that joint negotiation of purchases by trade competitors is never valid or permissible would appear to be arbitrary and indefensible. Similarly, to hold that the operation of association credit bureaus is under all circumstances legitimate and lawful might well lead to patently absurd results. If the limits of lawful co-operation in trade are indefinite, it is because they must necessarily be flexible. It is important, however, that the constructive activities of trade associations be safeguarded against harassing prosecution and unfounded condemnation. There are a number of internal and external safeguards which offer protection to trade associations against suspicion and attack.

One of the principal sources of security which may be cultivated by the internal administration of a trade association is the maintenance of publicity in all features of its work. There is no legitimate channel of business co-opera-

tion which requires secrecy for its fruitful exploration. From its very nature sound trade co-operation has no excuse for privacy. Trade associations are agencies for regulating the public relations of private concerns (for market relations are essentially public in their import), and for improving, according to their own standards, the effective background of private business enterprise. They are not profit-making bodies, and their services are designed to benefit entire trades or industries, to the ultimate advantage of the public, rather than special business units. Particular groups, calling themselves trade associations, may pursue sinister ends which require the cloak of secrecy for their successful realization. But in so far as trade associations conform to the prevailing type, they are so constituted and operate upon such a basis that they have nothing to gain from privacy, and much to gain from publicity in all their transactions.

Emphasis upon the educational aspect of trade co-operation constitutes another internal safeguard of prime importance. The whole program of association work can be made to reflect and to satisfy the "learning impulse" of men in business. There is no firmer foundation than this for the unhampered development of the trade association movement. And there is very little of the legitimate functioning of these associations which does not resolve itself into the interchange of information,[1] the cultivation of more intelligent management of industrial resources,[2] or the spread of a better understanding of the industry and its products among those not directly participating in its conduct.[3] By hewing to this line of educational endeavor—by striving to render productive and distributive processes more effective and industrial and commercial relationships more equitable—trade associations stimulate a favorable attitude toward their activities in the courts no less than in public opinion.

[1] As, for example, through the operation of exchanges, the collection and dissemination of trade statistics, the pooling of patent rights, or the interchange of credit information.

[2] As, for example, through the standardization of products, the development of business standards, the maintenance of commercial and industrial research, the encouragement of cost finding, the operation of traffic bureaus, the improvement of employment relations, or the study of insurance problems.

[3] Whether these outsiders be consumers, common carriers, insurance companies, or legislative bodies and administrative commissions.

The external safeguards of business co-operation may be found in the governmental measures which are designed to thwart or forestall the perversion of normal trade association activity. The rigid enforcement of well-recognized legal prohibitions must continue to serve as the chief means of promoting the legitimate orientation of trade co-operation. Experience has demonstrated that there is a strong temptation, when business men in any given trade or industry associate themselves for common action, to seek dominating power and easy profits through restrictive arrangements. Only the vigilance of prosecuting officials and the strict enforcement of the anti-trust laws against every association which deviates from the course sanctioned by the settled principles of public policy can keep the trade association movement within the channels of constructive co-operation. Only when the roads to illicit combination are consistently found to lead to defeat and disrepute, when the chances of success of illegitimate association have been reduced to a minimum, will business co-operation, even upon the highest plane, be rendered secure in fact as well as in law.

Judicial clarification of the scope of lawful trade association activity would further safeguard the development of legitimate business co-operation. It is hardly to be hoped, as has already been indicated, that the rules of law can be made so definite as to provide, in advance, a precise index of the legal status of every activity which a trade association may undertake. Legal rules, to be salutary, must necessarily express general principles and be couched in general terms, particularly when they seek to deal with large matters of public policy. But there is always the possibility that the adjudication of controversies involving particular statutory enactments and legal doctrines will not keep pace with the march of events. Those subject to a given law may grope in vain for its true meaning and exact scope. Something of this situation appears to have developed in the evolution of trade associations. The realization of the practical possibilities of these organizations has come so swiftly in recent years, and they have branched out latterly into so many lines of service, that the legal issues involved have been only in small part adjudicated. This fact has come to

the surface again and again in the course of the present study. Speculation and inference have had to supplement judicial determination in reaching conclusions upon the legal status of the various trade association activities. In terms of the practical development of business co-operation through trade associations this situation constitutes a deterrent of no small significance. But the removal of this uncertainty in the law is not a simple problem. It is not to be expected that in the decision of concrete cases judges will depart from the time-honored usage of confining their authoritative judgments to the specific issues presented. And the disposition of causes by the negotiation of consent decrees between the prosecuting authorities and the defendant associations, without judicial review, has introduced far more obscurity than light into the legal status of the various aspects of trade association procedure. The principal device of a novel character which has been suggested as a means of minimizing the uncertainty of the standing of current practices under the law is the declaratory judgment, whereby courts may clarify legal issues in advance of their actual emergence in specific controversies. It represents "what might be called preventive adjudication."[1] Aside from the fact that the advisory opinions thus enunciated are not final, there appear to be serious objections to the issuance of judgments which cannot, in their very nature, be based upon a full presentation of all the distinctive facts and circumstances bearing upon the issues which emerge in "ripened conflicts." The most helpful remedy, therefore, would seem to lie in the initiation of friendly suits against trade associations engaged in breaking new paths of business co-operation. The interpretations of the law thus evoked will assist in safeguarding the development of the association movement against restrictive arrangements and unhealthy growth.

Finally, the growth of co-operation between trade associations and governmental agencies affords a promising basis for the constructive development of trade association activi-

[1] For a comprehensive and incisive discussion of the broad principles involved in the method of the declaratory judgment, see Manley O. Hudson, "Advisory Opinions of National and International Courts," *Harvard Law Review*, June, 1924, Vol. XXXVII, No. 8, pp. 970–1001. See also Felix Frankfurter, "A Note on Advisory Opinions," *Ibid.*, pp. 1002–1009.

ties. The efforts of the Federal Trade Commission to raise the plane of competitive conduct can be greatly facilitated by the voluntary elimination of predatory tactics and dishonest practices, and by the establishment and enforcement of business standards which tend to promote the advancing ideals of the business community. There appears to be no more effective safeguard against harassing interference with business initiative than whole-hearted support of the aims of government to cleanse the business structure of the destructive excrescences which spring from unfair methods of competition. The growing development of codes of business ethics marks the beginnings of a movement in the right direction; its full fruits will be realized only when the sanctions of law are effectively supplemented by the open pressure of the associated participants in trade or industry. Moreover, the use of the "trade practice submittal," involving direct co-operation between trade associations and the Federal Trade Commission, represents a positive experiment, of preventive character, in charting the lines of demarcation between legitimate and illegitimate business conduct. But the most promising opportunities for co-operation are to be found in developing working arrangements between these trade bodies and the non-legal departments of government. Trade associations are in position to represent entire branches of industry with a considerable degree of authority, and they may thus facilitate the removal of at least the extreme maladjustments in employment relations. Such constructive efforts, in co-operation with publicly established agencies and on the basis of officially determined data, serve to emphasize, both in fact and in public contemplation, the salutary aspects of trade association activity, and to divert these bodies from the channels of restrictive policy. These opportunities for co-operation are especially noteworthy in connection with the activities of the Department of Commerce, and the greatest measure of progress has been achieved in this direction. The Department of Commerce has recognized the tremendous potentialities of responsible trade organization and has extended generous encouragement to the development of constructive business co-operation. "The trade association as a facility for the promotion

and self-regulation of industry and commerce," writes Secretary Hoover, "has become, by reason of its scope and activity, an important American business institution."[1] Accordingly, due recognition has been given to the representative character of trade associations, and the help and facilities of the various bureaus of the Department of Commerce have been rendered available to them. Perhaps the most significant results achieved through this *entente* have been in matters of standardization of products and of processes, and in the collection and publication of trade information. While the co-operative functions of the various governmental agencies have proved very fruitful, and might be further stimulated through the official registration of trade associations, there appears to be no distinctive need for the establishment of a special type of administrative supervision over trade associations.[2] The anti-trust laws, as interpreted by the courts and enforced by the Department of Justice and the Federal Trade Commission, provide at least as adequate safeguards against the abuses of trade associations as they do against the restraint of trade or monopoly which may spring from closely knit industrial combination.

§5. The Promise of the Trade Association Movement

The fundamental issue which the development of trade associations has presented to those responsible for the formulation of public policy is but one aspect of the historical problem of reconciling freedom and authority. On the one hand lies the individualistic policy of unfettered and unregulated competition, which has been found, in practice, to engender such waste and ill-will and to produce such a degree of mastery, often by the least scrupulous, as to

[1] "Trade Association Activities," Department of Commerce, Washington, 1923 p. 1.

[2] On April 3, 1922, Senator Edge of New Jersey introduced a bill (S. 3385) providing for the registration and regulation of trade associations by the Federal Trade Commission. The bill carried at least the suggestion of the possibility of constructive co-operation between the commission and registered trade associations in the compilation of statistical data. The measure was referred to the Committee on Interstate Commerce and was not reported back to the Senate. The same bill was introduced on April 4, 1922, in the House of Representatives (H. R. 11156).

disillusion the most confirmed *laissez-faire* enthusiasts. On the other hand lies the unpromising alternative of authoritative control of industry under official bureaucratic forms, which is generally deemed to involve such danger of inflexibility and stagnation in economic processes as to deter all but the most venturesome from embracing it. Between these extremes lies a course which the development of trade associations in recent times has made more than a visionary speculation. Through voluntary co-operation in trade and industry, safeguarded by the mandatory maintenance of freely competitive conditions, it is possible that there may be approximated the elusive synthesis of freedom and authority in the economic sphere. Stimulated by a developing sense of collective responsibility and held in check by the well-established mandates of public policy, the trade association movement may serve to reinvigorate the competitive system and facilitate the fulfillment of its best promise. The potentialities of trade associations have not in fact been fully perceived. Their contribution to a better organization of industrial control, though significant even under the tentative forms which have thus far prevailed, merely provides an indication of their unrealized possibilities. For this reason the functional approach, rather than the purely historical and descriptive point of view, has been stressed throughout this inquiry. And it provides sufficient warrant in closing, without overlooking the past accomplishments of trade associations and without distortion of perspective, to emphasize the fair promise of properly directed and properly safeguarded business co-operation.

APPENDICES

APPENDIX A

AN ESTIMATE OF THE NUMBER OF TRADE ASSOCIATIONS IN THE UNITED STATES

It is a matter of common knowledge that the organization of commercial and industrial enterprises into trade associations has assumed vast proportions. But the task of determining the number of trade associations in the United States with any degree of accuracy is beset with serious difficulties. These difficulties spring from two sources: the absence of any generally recognized line of demarcation between trade associations and other types of voluntary organization not conducted for profit, and the paucity of reliable information as to the extent of trade organization.

One of the distinguishing characteristics of a trade association is to be found in the fact that its membership is ordinarily limited to persons or firms engaged in a particular trade or industry—to the producers, or distributors, or both, of a particular product or generic class of products. On this basis, such general business organizations as the United States Chamber of Commerce or the National Association of Manufacturers, or corresponding local organizations, can not be classified as trade associations. Similarly, this conception of a trade association necessitates the exclusion of numerous farmers' organizations, even if the scope of the trade association movement is not confined to the fields of manufacture and commerce. While such an organization as the Apple Growers' Association might properly be deemed a trade association, since its membership is limited to those engaged in a particular field, general farmers' organizations, which aim to promote the interests of agriculturalists as a class, would appear to fall into the same category as the National Association of Manufacturers. On the other hand, those associated in the operation of exchanges for the marketing of the staple products of husbandry which are subject to accurate grading may be deemed to be organized into a special type of the trade association. The associates in the exchange are engaged in buying and selling specific products, and the rules of the exchange, like many of the activities of trade associations,

are designed to regulate the business conduct of the members. Exchanges represent the normal type of trade organization in certain special fields.

The trade association is also characterized by the fact that it does not itself, as an organized unit independent of its members, engage in the business activities of the trade or industry over which it exercises jurisdiction. Trade associations do not themselves produce, buy, or sell goods for profit. On this basis they are distinguished, of course, from ordinary business enterprises, whether organized as sole proprietorships, partnerships, or corporations. What is more important, however, this characteristic also differentiates them from co-operative buying or selling agencies, among manufacturers, merchants, or farmers, which are occasionally set up by business competitors, either upon the initiative of a trade association or independently of its influence. Moreover, trade associations, though entirely distinct from operating business enterprises, are quasi-permanent agencies, formally organized, for the promotion of co-operative activity in various directions among their constituent units. Accordingly, they must be distinguished from many of the loose and ephemeral organizations, largely of an earlier day, devoted exclusively to the enforcement of price agreements and pooling arrangements. While trade associations have frequently sought to restrict output, divide territory, or fix prices, these activities do not normally exhaust the range of their functions, nor is the pursuit of these activities restricted to a definite period of time. The early pooling arrangements, on the other hand, were specifically entered upon for purposes of curtailment of production, apportionment of output, division of territory, and price manipulation; they were usually in the nature of temporary agreements, in many cases of a secret character, and they frequently involved no formal organization. Commercial and industrial pooling arrangements as such, therefore, may be regarded as a separate and distinct type of business association. While pooling activity may constitute one of the functions of a given trade association it does not, of itself, give to the organization the status of a trade association as commonly conceived.

There appears to be valid ground for distinction, also, between trade associations and employers' associations. A trade association is a more or less inclusive organization of independent business units for dealing co-operatively with a wide range of problems confronting the given industry. The improvement of employment relations is frequently included in the ends sought to be achieved

through its associated activity. But the functions of an employers' association are generally confined to this special field, and its membership is based upon the status of the associates as employers rather than as business units. Accordingly, the members of employers' associations are frequently drawn from a great diversity of industries, on the basis of locality, rather than from persons and firms engaged in a particular trade. Moreover, most employers' associations are of one or the other of two types: either they are organized to facilitate negotiation with trade unions, or they are organized to combat or restrain unionism. The conflicting labor policies of different employers within each industry generally operate to prevent employers' associations from becoming fully representative. In most instances, therefore, the employers' associations merely supplement the work of trade associations.[1] But when organizations of employers confine the scope of their membership to a particular trade or industry, and extend their functions and activities beyond the limited field of labor relations, they may be deemed to be trade associations, despite their formal designation as employers' associations.

Professional organizations are not ordinarily regarded as trade associations. Such organizations as the American Economic Association, the American Chemical Society, the Federated American Engineering Societies, the American Medical Association, and the American Bar Association cannot properly be included in the same category as such typical trade organizations as the Writing Paper Manufacturers' Association, the Laundryowners' National Association, the National Association of Shoe Wholesalers, the National Association of Retail Grocers, and the Millinery Jobbers' Association. The professional associations are distinguishable from trade associations both as regards the character of their membership and the nature of their interests. The professional societies are composed of individuals, united primarily by a common intellectual interest in a particular field. Trade associations, on the other hand, are organizations of business units, which may be corporations, partnerships, or individual enterprisers, and the common interest of the membership is primarily economic rather than intellectual. But there are border-line cases which offer some difficulties of classification. Such organizations as the Ameri-

[1] The Stove Founders' National Defense Association, for example, is distinct from the National Association of Stove Manufacturers, although most of the members of the former organization belong to the latter. The Defense Association represents that portion of the employers in the stove industry favorable to negotiation with organized labor.

can Bankers' Association and the Association of Life Insurance Presidents, for example, are composed of individuals rather than of business units, and the associates may possibly be said to be engaged in semi-professional pursuits. In so far, however, as such organizations serve primarily as agencies for regulating the commercial conduct or promoting the economic interests of their membership, or of the business or vocation in which the associates are engaged, a trade association status would seem to be created.[1]

In addition to the problems involved in defining trade associations and differentiating them from other types of organization, the obstacles encountered in estimating the numerical strength of trade associations are due to the limited amount and unreliable character of available information. Only within the last decade have any attempts been made to record the extent to which industry is organized in trade associations, and these recent surveys are far from satisfactory.[2]

The various lists of commercial and industrial organizations published by the United States Department of Commerce include numerous organizations which clearly do not possess the principal characteristics of trade associations to which attention has been directed in the preceding pages, and which do not appear to satisfy any other reasonable conception of a trade association.[3] Moreover,

[1] Such organizations, for example, as the American Society of Composers, Authors, and Publishers, and the Graphic Arts Board of Trade would appear, on this basis, to fall into the category of trade associations.

[2] The difficulties of statistical measurement are increased in many instances because many organizations which sound "trade association" from their mere names may not be properly classifiable as such. There are various departments or bureaus, with jurisdiction over a particular activity, which are occasionally independent associations, but which more frequently are mere agencies of more comprehensive trade associations. In so far as organizations of this type, calling themselves protective associations, credit associations, cost bureaus, traffic bureaus, and the like, are but subordinate divisions of established trade associations, their inclusion in a list of trade associations obviously involves specious duplication. A like difficulty arises because the purposes of many organizations are not clearly indicated by their names. There are numerous associations of breeders of livestock which may function as trade associations or may be mere agencies for the registration of pedigrees or other special purposes. The Thoroughbred Horse Association, for example, might be almost anything, from an association of breeders to an organization for the promotion of horse racing. Similarly, the American Dahlia Society might be composed of nurserymen cultivating dahlias as a business or a club of miscellaneous individuals indulging a hobby. In the latter case such an organization would be no more a trade association than the American Numismatic Society.

[3] Lists of "Commercial and Industrial Organizations of the United States" were published by the Department of Commerce in 1913, 1915, 1917, 1919, and 1923. The following organizations, taken from the 1923 edition of this compilation, are representative of scores of others of this type, and illustrate the extremely

these lists fail to indicate the date of organization of the various associations enumerated therein, and hence provide no basis for tracing the growth of the movement. Any assumption that the associations added to the later lists are all newly organized is clearly unsupportable. It is quite obvious that the increase in the number of names listed is indicative, primarily, of more thorough and complete compilation.[1] There is also evidence of duplication arising from changes in the names of trade associations.[2] For similar reasons, the lists of trade associations and allied organizations published by the Chamber of Commerce of the State of New York are equally unreliable.[3] In measuring the extent of trade organization, therefore, it becomes necessary to rely upon estimates rather than upon accurate statistical data.

heterogeneous character of the organizations included within these lists: American Economic Association, American Civil Liberties Union, American Educational Association, American Patent Law Association, Associated Press, Bureau of Municipal Research, Dixie Highway Association, General Federation of Women's Clubs, Geological Society of America, Glass Bottle Blowers' Association of the United States and Canada, Italy-America Society, Joint Amnesty Committee, Kiwanis Club International, National Association of United States Civil Service Employees at Navy Yards and Stations, National Child Labor Committee, National Consumers' League, National Council on Education, National Daylight Saving Association, National Federation of Post Office Clerks. Such organizations clearly do not fall within the scope of trade associations. Many of them cannot properly be included even within the broader category of "commercial and industrial organizations."

[1] The following associations, for example, all of them organized prior to 1915, were omitted from the 1915 list: Poster Advertising Association (1891), American Association of Wholesale Opticians (1894), Music Publishers' Association (1895), National Erectors' Association (1903), Motor and Accessory Manufacturers' Association (1907), Corset Manufacturers' Association (1911), Casket Manufacturers' Association (1912), Institute of Makers of Explosives (1913). In the 1919 list, only the Music Publishers' Association and the National Erectors' Association were omitted. In the 1923 list, all of these associations were included. A comparison of the various lists discloses numerous instances of such increase in names resulting from more complete compilation rather than from the formation of new associations. The 1915 list contained approximately 3200 names; by 1919 the directory listed about 5800 organizations: the 1923 list included more than 11,000 names.

[2] For example, in the 1923 list, both the National Association of Electrical Contractors and Dealers and the Association of Electragists are included, although the former organization became the latter, through reorganization and change of name, in 1918.

[3] "Classified List of Trade and Allied Associations, etc.," Chamber of Commerce of the State of New York, New York, April 1, 1923. This list includes such diverse organizations, for example, as the following: Audit Bureau of Circulations, American Academy of Arts and Letters, Chemists Club, National Campaign for Boll Weevil Control, American Protective Tariff League, American Society for Thrift, Bureau of Industrial Research, National Civil Service Reform League, Garden Club of America, Committee on Drug Addictions. Moreover, it includes some trade associations, such as the American Dyes Institute and the Brass and Copper Statistical Exchange, which have ceased to exist.

As a basis for an independent judgment, a few of the published estimates may here be noted. Mr. Emmett Hay Naylor, of the Writing Paper Manufacturers' Association, who has been connected with the trade association movement for many years, wrote in 1921 that there are "at least 200 important national and interstate associations few of which overlap each other,"[1] although he listed some 800 associations. Two years later, in tracing the history of trade associations in America for the study of trade association activities published by the Department of Commerce, the same author gave very much higher estimates. He wrote: "In 1914 there were approximately 800 trade associations in this country, and in 1919 it was estimated that there were about 2000; many of these were short-lived so that the total today (1923) is nearer 1800."[2] Secretary Hoover, in his introduction to the same publication of the Department of Commerce, was much more general and cautious in his estimates. He wrote: "There are several hundred organizations in the United States which clearly come within the strict definition of the term and more than a thousand others which undertake to perform some of the services rendered by the avowed trade associations."[3] It should be noted that the earlier estimate of 200 expressly represented only "important national and interstate associations."[4] Since the precise basis of the later estimates is not indicated, it is impossible to check up their accuracy. But they doubtless included the less important national and interstate associations, and probably numerous local associations, or large numbers of so-called "commercial and industrial organizations" which cannot properly be accorded the status of trade associations.[5]

[1] E. H. Naylor, "Trade Associations, Their Organization and Management," New York, 1921, p. 24.

[2] E. H. Naylor, "History of Trade Associations in America," printed as Appendix A in "Trade Association Activities," Department of Commerce, Washington, 1923, pp. 301–307, 304.

[3] "Trade Association Activities," Department of Commerce, Washington, 1923, p. 1.

[4] The complete list of "Trade Associations in the United States" which appears as an appendix to Mr. Naylor's book ("Trade Associations," *op. cit.*, pp. 345–379), contains more than 800 names. This list "is based upon (1) the list compiled and revised to November 1, 1919, by the Bureau of Foreign and Domestic Commerce of the Department of Commerce, and (2) the membership list of the American Trade Association Executives, and (3) correspondence." With few exceptions (as, for example, the inclusion of the American Automobile Association), the organizations listed are properly classed as trade associations.

[5] In 1921 the Federal Trade Commission "undertook a special investigation concerning the activities of trade associations." A questionnaire, emphasizing statistical activities, was sent "to some 2750 different associations engaged in various activities closely related to different phases of production, marketing, or

The latest directory of "Commercial and Industrial Organizations of the United States" issued by the Department of Commerce affords the most comprehensive basic material for estimating the number of trade associations in the United States despite its various deficiencies previously noted.[1] Approximately 1500 interstate, national, and international organizations are listed. A careful analysis of this list, on the basis of the chief distinguishing characteristics of trade associations as previously defined, discloses that approximately 500, or about one-third of the names listed, represent types of organization unrelated to the trade association movement. Of the remaining 1000 organizations, about 850 clearly represent national and interstate trade associations. About 150 of the organizations listed are of somewhat doubtful character, from the standpoint of their status as trade associations.[2] On the other hand, a comparison of the Department of Commerce directory with other lists of recent date produced the names of some eighty-odd trade associations which had not been included in the Department of Commerce directory.[3] Even

distribution of commodities." Replies were received from 1515 associations. These replies were classified as follows:

Open-price associations, or those distributing or exchanging price information	150
Associations compiling or distributing trade statistics, not including prices	324
Non-statistical associations	799
Inactive or disbanded	150
Miscellaneous, incomplete replies	92
Total	1515

It should be noted that more than 60 per cent of those reporting fall into the non-statistical group. "Most of the associations of this class," said the Commission, "purport to be organized for social, scientific, or educational purposes and their activities comprehend a wide range of scientific, technical, and trade subjects." This characterization is too general to justify a conclusion as to whether all of these organizations may properly be deemed trade associations. The fact that replies were received from 150 inactive or disbanded organizations indicates one source of difficulty in estimating the extent of the trade association movement. See Federal Trade Commission, Annual Report for the Fiscal Year Ended June 30, 1922, pp. 51–53.

[1] "Commercial and Industrial Organizations of the United States," Bureau of Foreign and Domestic Commerce, Department of Commerce, Miscellaneous Series No. 99, Revised Edition, March 1, 1923.

[2] These organizations comprise groups of banking officials, insurance officers, livestock breeders, horticulturalists, and bureaus of various types which are in many instances subordinate divisions of more general trade associations.

[3] In the "Directory of National and International Associations" (appearing in "Trade Association Activities," Department of Commerce, Washington, 1923, Appendix D, pp. 326–347), 53 new names were found; in the "Classified List of Trade and Allied Associations, etc.," of the Chamber of Commerce of the State

after due allowance is made, therefore, for such duplication as may have arisen from the inclusion of interstate organizations which are subordinate divisions of national associations, it is fairly safe to assume the existence of between 800 and 1000 trade associations of national or interstate character at the present time.[1]

of New York, 23 new names were found, and 7 additional associations were located whose names are not listed in any one of the three compilations.

[1] The 1923 list of commercial and industrial organizations issued by the Department of Commerce also includes groups of state and local organizations, containing respectively 2000 and 7700 names. It is not feasible, however, on the basis of these figures to estimate the number of state and local trade associations. Chambers of Commerce, Merchants Associations, Rotary Clubs, and similar organizations, constitute the vast majority of the organizations listed. The local trade associations usually do not maintain an office with paid officials, except in the large cities, and hence their existence is not generally known. Moreover, many of these local organizations are in effect subordinate units of large interstate and national associations, so that their inclusion in any estimate of the extent of trade organization would involve duplication. Most of the exaggerated estimates of the number of trade associations are due either to the inclusion of such overlapping associations, or to the failure to distinguish between trade associations and other types of voluntary organization on a non-profit basis.

APPENDIX B

LIST OF REPRESENTATIVE TRADE ASSOCIATIONS ARRANGED CHRONOLOGICALLY ACCORDING TO DATE OF ORGANIZATION

1861 Writing Paper Manufacturers' Association
1862 United States Brewers' Association
1864 National Association of Wool Manufacturers
1865 New England Cotton Manufacturers' Association, reorganized, 1906, as National Association of Cotton Manufacturers
1866 National Board of Fire Underwriters
1872 Carriage Builders' National Association
National Association of Stove Manufacturers
Silk Association of America
Manufacturing Chemists' Association of the United States
1873 Millers' National Association of the United States
1874 National Jewelers' Board of Trade
1875 American Bankers' Association
1876 National Bottle Manufacturers' Association (disbanded, 1923)
National Wholesale Druggists' Association
American Congress of Nurserymen
1878 American Paper and Pulp Association
1879 United States Potters' Association
National Wagon Manufacturers' Association
1880 American Window Glass Manufacturers' Association
1882 American Street Railway Association, later, 1905, American Street and Interurban Railway Association, and, 1910, American Electric Railway Association
American Dental Trade Association
1883 National Association of Master Plumbers
American Railway Association
Laundryowners' National Association
Jewelers' Security Alliance of the United States
1884 Manufacturing Jewelers' Board of Trade
National Confectioners' Association of the United States
1885 National Electric Light Association
1886 National Brick Manufacturers' Association
National Association of Brass Manufacturers
1887 American Newspaper Publishers' Association
National Association of Builders
United Typothetæ of America

1888 National Paint, Oil and Varnish Association
American Boiler Manufacturers' Association
1889 National Association of Master Steam and Hot Water Fitters, later, Heating and Piping Contractors' National Association
Wholesale Saddlery Association of the United States
Southern Ice Exchange
National Association of Life Underwriters
1890 American Railway Bridge and Building Association
Southern Lumber Manufacturers' Association later, 1906, Southern Pine Manufacturers' Association, and, 1914, Southern Pine Association
1891 American Warehousemen's Association
Poster Advertising Association
Bill Posters' Associations of United States and Canada
Lake Carriers' Association
1893 National League of Commission Merchants of the United States
Tile Manufacturers' Credit Association
1894 American Association of Wholesale Opticians
National Wholesale Lumber Dealers' Association
National Fertilizer Association
1895 Association of Operative Millers
Music Publishers' Association of the United States
1896 National Association of Retail Grocers
National Association of Clothiers
National Hardwood Lumber Association
American Foundrymen's Association
1897 North Carolina Pine Association
National Piano Manufacturers' Association
American Cotton Manufacturers' Association
International Association of Electrotypers of America
American Mining Congress
1898 Western Association of Shoe Manufacturers and Wholesalers
Association of Fence Wire Stretcher Manufacturers
National Metal Trades Association
National Founders' Association
Cordage Manufacturers' Association
National Association of Retail Druggists
American Institute of Marine Underwriters
New York Tea Association, later, 1912, Tea Association of the United States of America
1899 Paint Manufacturers' Association of the United States
National Association of Shoe Wholesalers
American Baking Powder Association
United States Paper Bag Manufacturers' Association
National Jewelers' Board of Trade
1900 American Booksellers' Association
National Association of Box Manufacturers
National Retail Hardware Association

New England Rubber Club, later, 1909, Rubber Club of America, and, 1917, Rubber Association of America
National Federation of Implement and Vehicle Dealers' Associations
Millinery Jobbers' Association
1901 National Association of Music Merchants
National Association of Piano Dealers of America
National Electrical Contractors' Association, later, 1918, National Association of Electrical Contractors and Dealers, and, 1921, National Association of Electragists
American Hardware Manufacturers' Association
Biscuit and Cracker Manufacturers' Association
Quoin Club, later, Periodical Publishers' Association of America
1902 National Machine Tool Builders' Association
National Lumber Manufacturers' Association
Southern Supply and Machinery Dealers' Association
Hardwood Manufacturers' Association
National Lime Manufacturers' Association, later 1918, National Lime Association
1903 National Saddlery Manufacturers' Association
National Varnish Manufacturers' Association
National Erectors' Association
American Road Builders' Association
1904 National Leather and Shoe Finders' Association
National Association of Table Manufacturers (disbanded, 1923)
National Association of Marble Dealers
Southern Sash, Door and Millwork Manufacturers' Association
National Macaroni Manufacturers' Association
National Association of Stationers and Manufacturers
National Paper Trade Association
American Wood-Preservers' Association
American Concrete Pipe Association
1905 National Wood Chemical Association
Southern Cypress Manufacturers' Association
National Boot and Shoe Manufacturers' Association
American Association of Woolen and Worsted Manufacturers
American Steamship Owners' Association
National Retail Jewelers' Association
1906 American Spice Trade Association
Southern Fertilizer Association
Northern Pine Manufacturers' Association
National Wholesale Grocers' Association
Natural Gas Association of America
Associated Business Papers
1907 Eastern Ice Association
National Plow Association
American Photo Engravers' Association
Corset Manufacturers' Association

Prepared Roofing Association
Motor and Accessory Manufacturers' Association
National Kraut Packers' Association
National Association of Dyers and Cleaners
1908 Hickory Products Association
American Association of Electric Motor Manufacturers, later, Electric Power Club
National Association of Real Estate Boards
American Iron and Steel Institute
International Association of Garment Manufacturers
Railway Business Association
International Milk Dealers' Association
1909 Oak Flooring Manufacturers' Association
American Feed Manufacturers' Association
National Canners' Association
American Envelope Manufacturers' Association
National Pipe and Supplies Association
1910 National Association of Merchant Tailors
Northern Hemlock and Hardwood Manufacturers' Association
Red Cedar Shingle Manufacturers' Association
National Association of Upholstered Furniture Manufacturers
American Iron, Steel and Heavy Hardware Association
Motor Truck Association of America
1911 National Terra Cotta Society
National Implement and Vehicle Association, later, 1921, National Association of Farm Equipment Manufacturers
National Commercial Fixture Manufacturers' Association
American Drug Manufacturers' Association
Associated Metal Lath Manufacturers
National Retail Dry Goods Association
1912 National Association of Baby Vehicle Manufacturers
Casket Manufacturers' Association of the United States
National Association of Chair Manufacturers
American Walnut Manufacturers' Association
American Face Brick Association
National Tent and Awning Manufacturers
1913 National Association of Waste Material Dealers
American Drop Forge Association
Compressed Gas Manufacturers' Association
Institute of Makers of Explosives
National Automobile Chamber of Commerce
National Glass Distributors' Association
Southern Grate Manufacturers' Association
Fire Extinguisher Exchange
The Refractories Manufacturers' Association
1914 Motor Cycle and Allied Trades Association
Farm Mortgage Bankers' Association of America
National Warm Air Heating and Ventilating Association

National Automatic Sprinkler Association
American Pig Iron Association
1915 National Association of Newsdealers and Stationers
Tobacco Merchants' Association of the United States
National Association of Steel Furniture Manufacturers
Leather Belting Exchange
Optical Manufacturers' Association
Textile Color Card Association
Gas Products Association
Railway Car Manufacturers' Association
1916 Anthracite Coal Operators' Association
National Association of Corrugated and Fibre Box Manufacturers
National Association of Sheet and Tin Plate Manufacturers
Millinery Association of America
National Association of Printing Ink Makers
Toy Manufacturers of the United States
Wholesale Sash and Door Association
Sales Book Manufacturers' Association
National School Supply Association
National Association of Bedding Manufacturers
Magnesia Association of America
Label Manufacturers' National Association
Music Industries Chamber of Commerce
Associated Leather Goods Manufacturers of the United States
American Gear Manufacturers' Association
International Baby Chick Association
American Washing Machine Manufacturers' Association
1917 National Coal Association
Automotive Wood Wheel Manufacturers' Association
Tanners' Council of America
National Federation of Construction Industries
National Association of Ice Industries
Folding Box Manufacturers' National Association
National Retail Coal Merchants' Association
National Association of Chewing Gum Manufacturers
Electric Hoist Manufacturers' Association
National Selected Morticians
1918 American Zinc Institute
National Slag Association
American Hardwood Manufacturers' Association (disbanded, 1922)
National Association of Pattern Makers
Knitted Outerwear Manufacturers' Association (Western District)
Conveyor Manufacturers' Association
News Print Service Bureau
National Association of Button Manufacturers
1919 Locomotive Terminal Equipment Association
American Welding Society
Sheet Metal Ware Association

Association of Scientific Apparatus Makers
Concrete Products Association
American Gas Association
American Cloak and Suit Manufacturers' Association
National Petroleum Marketers' Association
National Paper Box Manufacturers' Association
National Council of Lighting Fixture Manufacturers
Association of Collar Manufacturers
Sterling Silverware Manufacturers' Association
American Petroleum Institute
Piano Bench Manufacturers' Association
Plywood Manufacturers' Association
Glass Container Association
Knitting Machine Manufacturers' Association
Asphalt Association
Greeting Card Association

1920 American Wholesale Lumber Association
National Chain Store Grocers' Association
National Cider and Vinegar Manufacturers' Association
National Association of Book Publishers
National Clay Products Industries Association
Automobile Body Builders' Association

1921 Association of Foreign Security Dealers of America
Rope Paper Sack Manufacturers' Association
Synthetic Organic Chemical Manufacturers' Association
Mahogany Association

1922 National Slate Association
American Hotel Association of the United States and Canada
Hardwood Manufacturers' Institute
National Peanut Butter Manufacturers' Association

1923 American Association of Oil Burner Manufacturers
Asbestos Brake Lining Association
Association of Foreign Language A. B. C. Publishers
National Association of Hat Manufacturers

1924 Scrap Steel Consumers' and Shippers' Conference
Southern Fabricators' Association

APPENDIX C

CROSS-LICENSING AGREEMENT OF NATIONAL AUTOMOBILE CHAMBER OF COMMERCE

WHEREAS, it is for the individual interests of the manufacturing members of the NATIONAL AUTOMOBILE CHAMBER OF COMMERCE, INC., a Corporation duly organized under the laws of the State of New York (hereinafter called the "Chamber"), that the possibility of patent litigation between manufacturing members of the Chamber over patents on or relating to motor vehicles or the manufacture thereof should be reduced, and to that end that there should be an exchange of licenses between them under Letters Patent for inventions relating to motor vehicles, or to parts or accessories therefor, or to the manufacture thereof, to the extent hereinafter set forth, such licenses to be of the character and subject to the conditions and limitations hereinafter provided:—

NOW, THEREFORE, THESE PRESENTS WITNESS:

1. That.....
a corporation duly established under the laws of.....
(hereinafter called the "Grantor"), being a manufacturing member of said Chamber, in consideration of the covenants of the Chamber herein contained and of other good and valuable considerations, hereby grants unto the Chamber the right and license and full power and authority, for the term and subject to the exceptions, conditions and limitations hereinafter set forth, to grant in writing personal licenses and shop rights under any and all Letters Patent of the United States, not hereinafter expressly excepted, covering intentions capable of use in or in connection with motor vehicles, or parts or accessories therefor, or in or in connection with the manufacture thereof (all of which are hereinafter referred to as "motor vehicle patents"), now or hereafter owned or controlled by the Grantor, or under which the Grantor now has or may hereafter have the right to grant such licenses or shop rights; and the Grantor does hereby irrevocably authorize said Chamber to execute such licenses and shop rights in the name of the Grantor with the same force and effect as if executed directly by the Grantor.

2. This instrument, and the right, power and authority hereby granted and conferred shall not apply to or include (a) design patents, which are hereby expressly excepted from the operation hereof, nor (b), any patents so far as the claims thereof cover inventions not applicable to or relating to motor vehicles as such, but relating to mechanism, devices or contrivances, or the manufacture thereof, specially employed to adapt motor vehicles to the carrying, handling or storing of goods, wares, merchandise,

materials, or freight of any kind, to use as fire apparatus, to use as tractors, to ambulance use, or to use as motor busses or for other public passenger service; and not applicable to or useful in any type of motor vehicle primarily intended or commonly used for private passenger use, or the manufacture thereof. Patents or claims for inventions relating or applicable both to one or more of the special adaptations of motor vehicles above enumerated, and also to any type or types of motor vehicles primarily intended or commonly used for private passenger use, or the manufacture thereof, are included within the operation of this instrument and not excepted.

3. This instrument and the right, power and authority hereby granted and conferred shall apply to and include only patents belonging to Class A as hereinafter defined, and shall not apply to or include patents belonging to Class B as hereinafter defined.

(a) Subject to the exceptions contained in paragraph 2 hereof, Class B shall include any motor vehicle patent, issued after the date hereof, of or under which the Grantor may hereafter acquire ownership or control or the right to grant licenses or shop rights, to the extent of any claim or claims thereof covering an invention which in the opinion of the Board of Directors of the Chamber, or in case of appeal as hereinafter provided, in the opinion of the arbitrators appointed hereunder, is of a striking character, involving a radical departure or a radical change from what is known, and resulting from an inventive effort of a high order; rather than a mere improvement, variation, modification or natural development of the existing art, resulting from an ordinary effort of the inventive faculty; provided (1) that such invention is developed within the Grantor's organization, that is to say, is devised and worked out by one or more agents or servants (including officers) of the Grantor, while employed in or about the Grantor's business of designing and manufacturing motor vehicle or parts or accessories therefor; and provided (2) that such patent is duly reported to the Chamber within the time and in the manner hereinafter provided, with a written request for the classification thereof, accompanied by the affidavits hereinafter provided for; but any delay in the fulfilment of this last proviso may be expressly waived in writing by the Chamber, provided such waiver is given with full knowledge of the material facts. All other motor vehicle patents, and all other claims of any motor vehicle patent (subject always to the exceptions contained in paragraph 2 hereof), shall belong to Class A, and shall be included within the operation of this instrument.

(b) In order that any motor vehicle patent or any claim thereof may be included in Class B, the Grantor must, at the time of reporting such patent to the Chamber as hereinafter provided, file as a part of such report a written request for the classification of such patent or claim as belonging to Class B, together with an affidavit or affidavits showing the date of issue of such patent, the manner in which the

rights of the Grantor thereunder were acquired, the date of such acquisition, and sufficient facts in detail in regard to the authorship of the invention covered by such patent, or by the claim or claims thereof in question, to show that such invention was in fact developed within the Grantor's organization, as that phrase is hereinabove defined. The Grantor must also furnish promptly on request such further information, relating both to the authorship and to the character of such invention, as the Chamber may reasonably require; and the Grantor hereby expressly covenants so to do. If it appears that the patent or claim in question fulfills all the conditions of Class B other than those relating to the character of the invention, the Chamber, acting through its Board of Directors, after such consultation with counsel and experts as they shall deem advisable, and, after affording the Grantor a reasonable opportunity to be heard, shall determine whether or not the said patent or claim fulfills the requirements of Class B in respect to the character of the invention, and shall forthwith notify the Grantor of its decision. The decision of the Chamber that any such invention is of the character required by the definition of Class B shall be, for the purposes of this instrument, final and conclusive. The decision of the Chamber that any such invention is not of that character shall also be final and conclusive, unless within ten days after notice of such decision the Grantor shall notify the Chamber in writing of its appeal from such decision, and its willingness to submit the question to arbitration as hereinafter provided. Thereupon the question whether said invention is of the character required by the definition of Class B hereinabove contained, shall be submitted to the judgment of three arbitrators, one to be appointed by the Chamber, one by the Grantor, and the third to be chosen by the Grantor from a list of not less than three disinterested persons submitted by the Chamber. The report of the arbitrators shall be in writing and shall be delivered both to the Chamber and to the Grantor, and a report signed by any two of the three arbitrators shall have the same effect as a report signed by all three. The decision of the said arbitrators on the question submitted to them as aforesaid shall be in all respects final and conclusive for the purposes of this instrument. But neither the acceptance of the affidavits filed by the Grantor as aforesaid, nor any proceedings taken by the Chamber as in this paragraph provided to determine the character of any invention, nor the submission of such question to said arbitrators, nor the determination of such question by the Chamber or by said arbitrators, shall be construed as an admission by the Chamber that the patent or claim in question fulfills the other conditions of Class B, not relating to the character of the invention, or bind the Chamber, on the ground of waiver or estoppel or otherwise, to recognize the said patent or claim in question as belonging to Class B, unless the same does in fact, fulfill all of said other conditions.

(c) The appointment of an arbitrator by each party shall be made by a writing delivered to the other party. If the Grantor shall fail

so to appoint its first arbitrator within forty days after giving notice of appeal as aforesaid, or shall fail to choose a third arbitrator from the list submitted by the Chamber as aforesaid, within ten days after the due submission of such list and the due appointment of the first two arbitrators (whichever shall last occur), the Grantor shall be considered to have waived its right of appeal, and the decision of the Chamber on the character of the invention in question shall stand as final and conclusive. If the Chamber shall fail to appoint an arbitrator as above provided within forty days after the receipt of notice of appeal as aforesaid, or shall fail to submit in writing to the Grantor not later than ten days after the due appointment of the first two arbitrators, a list of at least three persons, believed by the officers of the Chamber after reasonable inquiry to be competent, disinterested, and able and willing to serve, from whom a third arbitrator may be chosen, the appeal of the Grantor shall be considered as sustained and the decision of the Chamber reversed without further proceedings. Either party before appointing its first arbitrator must assure itself that the person so appointed is willing to serve and under no disability; and the refusal to serve of either of the first two arbitrators, except for disability arising after such assurance is obtained, shall be equivalent to non-appointment. Any vacancy occurring in said board of arbitrators or said list of nominees, either through death or, in the case of either of the first two arbitrators, through any disability arising after the assurance above mentioned shall have been obtained, or, in the case of said list of nominees or said third arbitrator, from any cause, shall be filled by appointment or nomination in the same manner in which the original appointment or nomination was required to be made and subject to the same penalties, the periods of time above limited being reckoned from notice of such vacancy. Any failure of either party to act within the times required by the foregoing provisions of this paragraph may be waived by written agreement of the parties hereto. Each party to said arbitration shall bear its own expenses for counsel fees, witnesses, experts, travel, preparation of models, and the like. The reasonable compensation and expenses of said arbitrators, including the pay and expenses of stenographic, clerical and other assistants properly employed by them, shall be borne by the losing party, it being understood that the Chamber may at its option guarantee the payment thereof, or pay the same or any part thereof in the first instance, but the Grantor hereby covenants promptly to reimburse the Chamber for any payments so made, in the event that the decision of said arbitrators shall be adverse to the Grantor.

(d) The Chamber shall have no right, power or authority hereunder to grant any licenses or shop rights under any patent issued after the date hereof, and developed within the Grantor's organization as that phrase is hereinbefore defined, of or under which the Grantor shall hereafter acquire ownership or control or the right to grant such licenses or shop rights, until the expiration of thirty days after such

acquisition; and if within said period of thirty days, such acquisition shall be duly reported to the Chamber, with a written request for the classification of such patent or any claim thereof as herein provided, together with the affidavits hereinabove required to accompany such request, the Chamber shall have no right, power or authority to grant licenses or shop rights covering the same until after it has been finally determined, in the manner above provided, that the patent or claim in question belongs to Class A; and the Chamber hereby expressly covenants not to execute any grants or licenses or shop rights in violation of this provision.

(e) Neither the classification of any patent or claim, in the manner herein provided, as belonging to Class B, nor the action of any director of the Chamber in joining in a decision to that effect, shall be effective, or be used in evidence, for any purpose except to exclude such patent or claim from the operation of this instrument; and the Grantor so covenants with the Chamber for the benefit of the Chamber and each and every member thereof; and upon such classification of any patent or claim as belonging to Class B, the Chamber and every member thereof shall have the same right to deny or contest the scope or validity of such patent or claim as if this instrument had never been executed and the proceedings had hereunder had never taken place.

4. The right, power and authority hereby granted and conferred shall apply to any patent only so far as the Grantor now has, or shall have at any time hereafter, the right to grant licenses or shop rights thereunder without violating the legal or equitable rights of any other person, whether secured to him by contract, license agreement, or otherwise, having priority over the rights granted to the Chamber by this instrument; and all licenses or shop rights granted hereunder shall contain such exceptions or such special restrictions, in the case of particular patents, as may be necessary to avoid the violation of such rights of third persons. But the Grantor hereby covenants that it will not hereafter, having the ownership or control of a Class A motor vehicle patent, or the right to grant licenses or shop rights thereunder, enter into any contract, license agreement, or other arrangement, whereby its rights under such patent shall be diminished, limited or surrendered, so as to exclude or restrict the operation of this instrument in respect to such patent.

The Grantor further covenants that it will not hereafter contract for any license or shop rights under any motor vehicle patent which may be owned or controlled by any other person, firm or corporation (but which, if owned by the Grantor, would belong to Class A as defined in this instrument), under any form of contract or license, by the terms of which such person, firm or corporation would be prevented from granting to other manufacturing members of the Chamber similar rights on the same terms, unless the Grantor obtains at the same time the right itself to grant licenses and shop rights under said patent, whereby the same will be brought under the operation of this instrument.

5. If the Grantor does now or shall hereafter enjoy the use, in the con-

duct of its business, of any Class A motor vehicle patent controlled by the Grantor either by contract, equitable ownership, exclusive license or otherwise, so that the Grantor has the legal right and power to procure the grant of licenses or shop rights thereunder to others, but is not empowered to grant such licenses or shop rights directly, the Grantor hereby covenants to procure the execution of such further instruments as may be necessary to empower the Chamber to grant licenses and shop rights under such patents as provided in this instrument. Provided, however, that if such patent shall have been issued after the date hereof, and in the opinion of the Grantor such patent or any claim thereof covers an invention of the character required by the definition of Class B, and if the invention covered thereby shall have been developed within the Grantor's organization as hereinabove defined, the Grantor may first report such patent to the Chamber as herein provided, with its written request for the classification thereof, accompanied by affidavits as hereinabove provided, and thereupon shall not be required to procure the execution of such additional instrument or instruments covering any claim of said patent so brought in question, until after it has been finally determined, in the manner herein provided, that the patent or claim in question belongs, in respect to the character of the invention, to Class A, and not to Class B.

6. The Grantor hereby agrees to mail to the office of the Chamber in New York City, within thirty days from the date thereof, a list of all patents within the general description contained in paragraph 1 hereof (not including design patents) now owned or controlled by it or under which it now has the right to grant licenses or shop rights (including patents in which the Grantor has such an interest as is defined in paragraph 5 hereof); and further agrees to report to the Chamber in writing, within thirty days after the acquisition thereof, any further such patents, of or under which it shall hereafter acquire ownership or control or the right to grant licenses or shop rights. But the failure or neglect of the Grantor to list or report any patent as herein agreed, shall in no way affect the operation of this instrument upon such patent, except as it may determine the classification thereof in Class A, as hereinabove provided.

7. The Chamber shall have the right, power and authority hereunder to grant licenses and shop rights only to such manufacturing members of the Chamber as may be at the time of such grant in good standing and shall have executed, in accordance with the provisions hereinafter contained in paragraph 11 hereof, an instrument substantially equivalent to this, giving to the Chamber the same power and authority to grant licenses and shop rights under patents at the time of such execution or thereafter owned or controlled by such manufacturing members respectively, or under which such manufacturing members respectively may then or thereafter have the right to grant such licenses or shop rights, as is given by this instrument in respect to patents in which the Grantor has or may hereafter have corresponding rights.

8. The licenses and shop rights granted by the Chamber hereunder shall in each case authorize the licensee therein named to manufacture in its regular manufacturing establishment within the United States, or to have

manufactured for it within the United States, and to use and to sell for others to use, motor vehicles and accessories and repair and replacement and other parts therefor, including the shipment thereof to foreign countries and the use and sale thereof in such foreign countries, free from any liability for infringement of the Letters Patent of the United States under which such licenses and shop rights are granted, so far as the Grantor has power to grant such authority. But it is expressly stipulated and agreed that neither this instrument nor any license or shop right granted hereunder shall be construed to give any rights whatever under foreign patents, whether or not owned by the Grantor, and all grants of licenses or shop rights hereunder shall expressly so state.

All licenses and shop rights granted by the Chamber hereunder shall be substantially uniform in tenor (except as provided in paragraph 4 hereof) and shall be in strict accordance with all the conditions and limitations specified in this instrument, and the covenants of the Chamber hereinafter set forth, all of which, so far as they relate to the grant of licenses or shop rights hereunder, shall be construed not merely as covenants by the Chamber, but also as defining and limiting the right, power and authority hereby granted and conferred.

9. All the grants of licenses or shop rights hereunder must be executed in behalf of the Chamber by one of its officers thereunto duly authorized; must be indivisible, non-assignable, and personal to the licensee; and must contain a statement that such grant is executed in pursuance of the right, power and authority given by this instrument. Such licenses and shop rights shall extend, and must be stated in the grant thereof to extend, only for so long as the licensee named therein shall remain a manufacturing member of the Chamber in good standing, and for six months thereafter, but in no event beyond the first day of January, 1925. All such grants shall contain a provision reserving against the licensee the same rights with respect to a material breach of the terms of the instrument similar to this executed by the licensee, which are reserved against the Grantor in paragraph 16 hereof, in respect to a material breach of the terms of this instrument.

10. If the control or interest or right of the Grantor in any patent coming within the operation of this instrument is subject to such conditions that the use of such patent by other members of the Chamber licensed hereunder would involve the payment to any person or persons other than the Grantor of additional royalties or additional consideration for the use thereof, the licenses and shop rights thereunder granted by the Chamber pursuant to the terms of this instrument shall stipulate for the payment by each licensee of the additional royalties or additional consideration payable by reason of the use of such patent by such licensee; but the Grantor shall not be entitled to receive to its own use and profit any royalty or other consideration from the grantee of any license or shop right granted by the Chamber under the terms of this instrument, except the reciprocal rights expressly provided for in this instrument. It is understood, however, that any member of the Chamber entitled to receive grants of licenses or shop rights hereunder may refuse to accept a license or shop right under

any one or more patents, for the use of which any royalty or other special consideration must be paid under the terms of this paragraph, or, having accepted such license or shop right, may at any time thereafter surrender the same, and upon such surrender and to the extent thereof shall be freed from the special obligations so imposed.

11. In consideration of the foregoing, and of the further covenants on the part of the Grantor hereinafter contained, the Chamber hereby covenants and agrees as follows:

(a) That in exercising or attempting to exercise the right, power and authority hereby granted and conferred it will conform strictly in all respects to the terms and provisions of this instrument and the limitations herein contained.

(b) That the Chamber will not grant any license or shop rights hereunder until at least sixty-one manufacturing members of the Chamber, owning or controlling, or having the right to grant licenses or shop rights under, in the aggregate, at least three hundred patents of the class which would come within the operation of this instrument, have executed and delivered to the Chamber instruments substantially equivalent to this.

(c) That when the conditions stated in the preceding clause shall be fulfilled, the Chamber will forthwith grant to the Grantor all licenses and shop rights which it is authorized to grant under the instruments substantially equivalent to this executed by other members of the Chamber, except so far as the Grantor may refuse to accept a license or shop right under a particular patent or patents, as provided in the paragraphs of said instruments executed by other members of the Chamber as aforesaid, corresponding to paragraph 10 hereof; it being understood that, subject to the same exception, the Chamber will at the same time grant to all other members thereto entitled, the licenses and shop rights which it is authorized to grant hereunder.

(d) When said condition stated in clause (b) of this paragraph is fulfilled the Chamber will forthwith notify all its manufacturing members who have not executed and delivered instruments substantially equivalent to this, that a period of six months and no more after the date of such notice will be allowed within which said manufacturing members may execute and deliver such instruments, and thereby qualify to receive licenses or shop rights hereunder. No such manufacturing member shall be allowed to qualify as aforesaid after the expiration of said six months' period, except by special permission of the Chamber, granted in the following manner: Notice of the application of any such member for such permission shall be mailed to all the directors of the Chamber at least ten days before a regular meeting of said directors, stating that such application will be presented for action at said regular meeting; and a quorum being present at said meeting, said application may be granted by a four-fifths vote of all the directors present.

(e) Every applicant for admission to the Chamber, as a manufacturing member thereof, after said condition stated in clause (b) of this paragraph is fulfilled, will be required as a pre-requisite of such admission to execute and deliver to the Chamber an instrument substantially equivalent to this.

12. The right, license, power and authority herein granted and conveyed to the Chamber are not transferable by it to any other body or successor, but shall be exercised by the Chamber alone, acting through its Board of Directors and its duly authorized officers.

13. In case the Grantor ceases to be a manufacturing member of the Chamber in good standing, the right, power and authority of the Chamber to grant licenses and shop rights hereunder shall not cease and determine, but shall thereafter remain in full force until January 1, 1925, and all licenses and shop rights granted by the Chamber in accordance with this instrument, whether before or after such termination of membership, shall be and remain in full effect and validity.

14. On the termination of any license or shop right granted by the Chamber hereunder, the licensee shall be free to contest the validity of any patent included in such license exactly as if such license had not been granted.

15. Subject to the condition stated in paragraph 11, clause (b) hereof, the Grantor covenants and agrees to waive and release, and does hereby waive and release any claim it may now or hereafter have for damages or profits on account of the infringement of any patent covered by this instrument, by reason of the manufacture of any motor vehicles, parts or accessories by or for any grantee of licenses or shop rights hereunder, before the granting thereof, or by reason of the use or sale of such licensee or by any other person of motor vehicles, parts or accessories so manufactured; and the Grantor hereby authorizes the Chamber to incorporate in all grants of licenses or shop rights hereunder a statement confirming such waiver and release to the licensee, and to all persons who may have sold or used motor vehicles, parts or accessories, previously manufactured by or for such licensee.

16. Any material breach by the Grantor of its agreements herein contained or its obligations hereby imposed, shall be sufficient ground for the cancellation by the Chamber of any or all grants of licenses or shop rights by the Chamber to the Grantor, which may have been made under other instruments substantially equivalent to this executed by other manufacturing members of the Chamber.

In Witness Whereof, the Grantor and the Chamber have duly executed this instrument by their officers thereunto duly authorized and attached their corporate seals hereto this.....day of.....19 .

.....

(Seal) By

.....

.....

National Automobile Chamber of Commerce, Inc.,

By

(Seal)

.....

.....

APPENDIX D

RULES AND REGULATIONS FOR COMMERCIAL ARBITRATION

(a) Arbitration System for Trade Associations Proposed by United States Chamber of Commerce

GOOD OFFICES AND ARBITRATION PRINCIPLES

I. *Advocacy of arbitration.* Each organization should include in its purposes a declaration that it advocates use of means for immediate settlement of business disputes upon their merits; that arbitration is a means to that end; that the standard of business conduct required of members and expected of other business men includes willingness, under proper circumstances to submit their business differences to settlement through such means; that the appropriate officials of the organization may take steps to enforce this standard of business conduct among the members.

Advocacy of the use of arbitration should include promotion of insertion of a clause in contracts among business men to provide that controversies arising in connection with such contracts will be submitted to arbitration under the rules of the organization named in the clause. Such a clause may be simple, taking such form as: "All questions arising in connection with the interpretation or execution of this contract shall be settled by arbitration under the rules of the (name of organization)."

II. *Committee.* Each organization should have a committee on arbitration, which should have not less than five nor more than nine members. It should be appointed by the board of directors. An effort should be made to continue, from year to year, members who are diligent and active, in order that the benefits of their experience may be conserved. Members should be selected because of their standing and their willingness to give the necessary time to the work of the committee. The chairman should be designated by the board. Three should be a quorum for the transaction of business.

All matters which come before the organization and which lead, or tend to lead, to arbitration should be referred to the committee.

III. *Committee's preliminary consideration.* Upon receiving a complaint coming within the general purview of the rules with respect to the conduct of arbitration, the committee on arbitration should have in mind that it may find the circumstances appropriate either for use of good offices, which might lead to an amicable adjustment, or for arbitration without the intervention of efforts for adjustment through good offices, or for sug-

gestions that the question is not appropriate for arbitration because protection of interests involved might require immediate proceedings at law. The committee may also find that the parties should be referred to the arbitration committee of some other organization.

In order that the committee may reach a decision about which of these courses is appropriate, it should act under its right to call upon the person making the complaint, or both parties, for such statements as the committee may desire.

The committee may conclude that none of the three courses is desirable, if it finds that the complainant bases his grievance only upon his expectation of what may later occur, or because the party complaining has not himself presented his views to the other party or otherwise used his own proper efforts to bring about an understanding or adjustment.

A committee will also be conscious that it should not attempt to act in connection with mere trivialities and should not undertake to be an agency for inducing debtors to pay their creditors in connection with transactions as to the elements in which no substantial dispute has actually arisen.

IV. *Good Offices.* If the committee decides that the circumstances permit use of good offices it should proceed to tender its good offices to both sides through the chairman, the secretary, or such member of the committee as may be designated by the chairman.

The person acting in this behalf should continue his good offices until an amicable adjustment is reached by the parties to the controversy, or the impossibility of such an adjustment becomes clear. In either event he should report forthwith to the committee.

V. *Arbitration.* If the committee decides that the circumstances make arbitration appropriate, whether this decision is reached initially or after failure of good offices exercised in the manner stated above, it should propose arbitration to the parties. If the parties, in their contract or otherwise, have agreed to arbitrate differences, the arbitration should be in accordance with their contract which may, for example, provide for arbitration before appointees of a judge of the courts or according to the rules of another organization. Otherwise, the committee should tender arbitration under the rules of its own organization.

VI. *Arbitrators.* When the committee decides that a case should be arbitrated under the rules of its organization, it should place before the parties the possibility of their agreeing upon a single arbitrator or a board of arbitration; should inform the parties that either a sole arbitrator or the third arbitrator on a board may, if the parties so desire, be selected from the membership of the committee; should proffer its good offices toward obtaining the services as arbitrator of any appropriate person either party, or both, may select; and should express its readiness to assist the parties to reach their agreement as to the exact question to be submitted to arbitration, or otherwise to facilitate the proceedings: *Provided*, That arbitrators selected by the parties must in all cases be acceptable to the committee.

When an award has been declared final and binding by the arbitration

committee, the committee and its organization will take all necessary steps within their power to bring about compliance by a party who is in any sense delinquent and whose delinquency has been brought to the committee's attention.

Rules for Conduct of Arbitration

1. These rules are intended to refer to controversies which arise between business men in the course of their business pursuits. Within the meaning of these rules, a controversy suitable for arbitration may exist even though there is as yet no question as to damage suffered by either party: *Provided*, That there is a substantial question between the parties as to their rights and obligations.

2. *Obligation to arbitrate.* Any controversy coming within the purview of these rules and arising between members of the (name of organization) shall be submitted to arbitration at the request of either made within a reasonable time: *Provided*, That submission to arbitration will not, in the judgment of the committee, prejudicially affect the interests of either party through delay or otherwise.

3. Any controversy coming within the purview of these rules and arising between a member of the (name of organization) and a non-member under a contract providing for arbitration under these rules shall be submitted to arbitration at the request of either of the parties made within a reasonable time: *Provided*, That submission to arbitration will not prejudicially affect the interests of the member and that the non-member through affording security or in other appropriate manner creates an equality as between himself and the member in regard to actual liability to fulfill the award.

4. *Legal rights.* Submission to arbitration requires that any legal proceedings which have been started upon the same question should be suspended and that no legal proceedings should be inaugurated while the arbitration is pending.

5. *Enforcement of awards.* The submission shall contain a statement whether or not the parties intend that the award is to be enforceable through judicial process. If the parties intend that the award should be capable of execution in this manner, they shall place the submission in such form, and take such other steps as are necessary for this purpose. If the parties do not express such an intention, they will be understood to contemplate reliance upon the force of mutual good faith and the appropriate action by the organization or organizations to which either or both parties belong to bring about compliance with the award, but such reliance is not to prevent the prevailing party, under appropriate circumstances, from basing a legal action upon the award.

6. *Submission.* When the circumstances do not require the fulfillment of formalities specified by statutes, and the committee does not suggest to the parties that the complexities of the case make it desirable that they should unite in a statement of the questions and matters essential to the arbitration, the execution of a formal document of submission should be required: *Provided*, That the parties have otherwise given their

assent and have so described their differences as to enable arbitrators to understand the issues; and *provided further*, That the award in such a case shall set out the issues as they are found by the arbitrators.

7. *Revocability.* The parties to a submission under these rules agree that neither will at any stage attempt to revoke the submission.

8. *Co-operation of parties.* Persons who make themselves parties to arbitration under these rules place themselves under obligation to expedite and facilitate the proceedings in every way within their power.

9. *Evidence and witnesses.* The purpose of arbitration under these rules is to obtain a determination of business controversies upon their merits. Persons becoming parties to an arbitration under these rules subscribe to this purpose and participate in its benefits. They are, therefore, under obligation to produce quickly and freely all documents, records, and other evidence which may be within their possession and which, being material to the questions in controversy, are required by the committee or the arbitrators, upon their own initiative or upon suggestion of the other party made to the committee or the arbitrators. The parties will attempt to obtain the attendance of such witnesses as may be similarly required.

10. *Periods of time allowed.* When the committee decides that in a particular case arbitration should proceed under these rules, it shall so notify the parties, including in the notification the steps which the parties are to take. Within seven days the parties shall take the necessary steps, choose their arbitrators, obtain their consent to serve, and give notice to the committee of the completion of the steps. In the event each party is to choose an arbitrator, the two arbitrators shall within three days additional select the third and notify the committee.

Within seven days of the appointment of the arbitrator or completion of the board of arbitrators, the arbitrators shall hold their first meeting at a time and place approved by the committee, and the parties shall attend and be ready to present their evidence. The hearings shall proceed with all possible expedition and with only such adjournments as the circumstances and the convenience of the arbitrators may require. The length of the hearings and the time allotted to the parties shall be within the discretion of the arbitrators. A party who does not appear at a reasonable time and place to present his case shall be deemed to have waived his right to present his case at a hearing.

Not more than seven days after the completion of the hearings the arbitrators shall file their award with the committee.

The limitations of time fixed in the paragraphs of this rule may be extended by the committee as may be appropriate in any case.

11. *Conduct of hearings.* Parties may be represented at hearings by legal counsel only with consent of the committee and upon request of the arbitrators: *Provided*, That no party may against his wish be required to be represented by legal counsel.

If a party can not, because of distance or for other reasons, appear in person he may be represented by an agent authorized by letter or other writing presented to the arbitrators to act for him in all respects in the arbitration.

The arbitrators may require any evidence to be presented under oath and the party upon whose behalf such evidence is received shall pay the notarial or other fees requisite for this purpose.

On account of distance or through choice the parties may elect to present their case upon the documents and written statements. In this event they shall respond promptly to any inquiries sent them by the arbitrators: *Provided*, That of such an inquiry addressed to one party a copy shall be sent to the other.

To keep minutes and such records as the arbitrators may require and, at their request, to be custodian of documents and to perform such similar services as they desire, a clerk shall be appointed by the committee from the staff of the organization. No stenographic report of the hearings shall be made, however, unless required by the committee or requested jointly by the parties, and the cost thereof shall be shared equally by the parties who shall as a condition precedent, deposit with the committee a sum sufficient in the committee's opinion, to meet the cost.

Hearings shall not be public, but members of the committee shall at all times have right to be present.

12. *Majority decisions.* If a board of arbitrators acts in a case, the decision of a majority upon any question, including the award, shall be the decision of the board: *Provided further*, That a decision may be made by a board only if all members of the board participate therein: *Provided further*, That for inattention to duties or other conduct prejudicial to the case or tending to bring arbitrators into disrepute, the committee may, upon complaint of either party or of one or more arbitrators and after an opportunity for hearing, declare that a member of a board has so conducted himself as to cause the place he occupied on the board to be vacant: *Provided also*, That a place upon a board which becomes vacant or is declared vacant shall be filled under the conditions and in the manner in which the original appointment was made.

13. *The award.* The award shall be stated in writing, shall be notified to the parties, and shall be filed with the committee, accompanied by an indication of the notices which have been given. If neither party gives notice of protest to the committee within a period of seven days, the award shall be final and binding, and notice to this effect shall be given by the committee to both the parties. If either party gives notice of protest against the award within the period of seven days, by immediate course of the mails, and assigns reasons in support of the protest, and the committee finds there may be reasonable grounds for the protest, the effectiveness of the award shall be postponed until the committee can receive evidence of the facts. Protests shall be entertained only on such grounds as improper conduct on the part of the arbitrators or lack of responsiveness in the award of the issues. After hearings the committee shall forthwith either dismiss the protest or declare the award of no effect. In the latter event it shall either direct a rehearing, complete or partial, before the arbitrators or require appointment of new arbitrators and a new arbitration proceeding to be held as if no other has occurred.

14. If the circumstances of a case disclose that while the controversy

is pending there may be aggravation of damages, as in a case involving rejection of perishable merchandise, the committee shall forthwith propose to the parties that they assent, saving all of their rights, to such a disposal of the merchandise or such a course with other subject matter as will prevent further deterioration or aggravation of damages in any other form. In all such cases the committee shall place the facts before the arbitrators.

15. *Compensation of arbitrators.* Arbitrators should recognize that they are rendering a service on behalf of the business community or the line of industry of which they are a part. Fees to arbitrators, if any, should not exceed for each arbitrator $10 a day, except by agreement of the parties, which agreement is approved by the committee.

16. *Records.* When the arbitrators file an award they shall likewise deliver to the committee the papers and other documents connected with the case. Such papers and documents as are not properly returnable to the parties shall be placed in the files of the committee, in which shall be kept a record of each case.

17. *Definitions.* As used in these rules, the word "organization" means the (name of organization); the word "committee" means the committee on arbitration of the (name of organization); the word "arbitrators" includes a sole arbitrator as well as a board of arbitrators.

(b) Arbitration Plan of National Wholesale Grocers' Association and Affiliated Organizations

The National Wholesale Grocers' Association and the National Food Brokers' Association, with the approval of the National Canners' Association, announce the following Rules and Regulations for the guidance of those employing the arbitration system:

I. When the parties cannot satisfactorily settle a controversy, or the contract under which the merchandise was purchased calls for arbitration if necessary, they should arrange to have the case determined under the arbitration plan;

II. They should notify the Chairman of the Arbitration Committee in the city or district where the dispute arises. If such committee has not been appointed, or if, for any reason, the parties desire to hold the arbitration elsewhere, then they should notify the Chairman of the Arbitration Committee of the city or district upon which they shall agree. The Chairman of the Arbitration Committee for the city or district shall then appoint from the Committee three arbitrators to hear and decide the case. A member of the committee interested in a given case shall not be eligible to act as arbitrator. These arbitrators may be two wholesale grocers and one broker, or two brokers and one wholesale grocer, as the Chairman may determine. The Chairman may be one of the three arbitrators. If the Chairman be interested in a given case, the three arbitrators therein shall be appointed by the Committee or such members thereof as are not interested in that case;

III. We have prepared and published herewith a form of "ARBITRA-

TION AGREEMENT." The Chairman shall furnish all parties to the arbitration with a blank agreement, to be completed, signed and executed by them. The agreement, properly executed, must be returned to the Chairman of the Arbitration Committee before the arbitration is held. The Chairman shall arrange with the parties for a convenient time and place for the presentation of the case;

IV. Each case must be clearly stated to the arbitrators, either orally or in writing. If the parties agree to state the case in writing, the facts shall be set forth in a plain and concise statement and the assent of all parties thereto shall be noted thereon in writing. It shall then be referred to the arbitrators for decision without further argument, unless all parties shall agree otherwise. If the case is to be presented orally each principal shall make his statement in such a manner as the arbitrators may direct;

V. If the nature of the case is such that it is necessary, or the arbitrators desire, that samples of the merchandise in question shall be exhibited to them, such samples must be submitted by one or all of the principals, at such time and place as the arbitrators require, and every facility must be afforded for their examination. These samples must fairly represent the average quality and condition of the merchandise and shall be in such quantities as the arbitrators direct. The arbitrators themselves, if they so desire, shall be permitted to take samples directly from the merchandise. If additional samples are required, they shall be furnished in the same manner, and to whatever extent the arbitrators may direct;

VI. Upon request of the arbitrators, the parties must furnish all contracts, letters or other data bearing on the case, that the arbitrators may consider necessary to a proper determination of the controversy. All such documents and data must be returned to the respective parties by the Chairman of the Arbitration Committee;

VII. The concurrence of two of the three arbitrators shall be necessary to a decision and such decision shall be binding upon the parties; but it is most desirable in all cases that the decision shall be unanimous;

VIII. The arbitrators shall render their decision in writing and shall state as briefly as possible, the case, the decision and the reasons therefore. The decision shall be signed by at least two of the arbitrators, and by all if the decision be unanimous. At least five copies of this statement shall be made. It shall be the duty of the Chairman of the Arbitration Committee to see that each of the parties and also the Secretary of the National Wholesale Grocers' Association, at No. 6 Harrison Street, New York City, the Secretary of the National Canners' Association, and the Secretary of the National Food Brokers' Association, receives a copy of the written decision;

IX. All proceedings and decisions of the arbitrators in these cases are to be held strictly confidential as regards the parties and all information as to the facts, unless the parties interested shall otherwise consent;

X. Reports of the arbitration work will be issued from time to time by the Secretary, but, unless the parties shall otherwise agree, no such report shall furnish the names of the parties or any information regarding the case that should be held in confidence;

XI. If no two of the arbitrators are able to agree upon a decision, a second arbitration may be held, if the parties so desire. The same plan shall be followed as in the first arbitration, except that the Chairman shall not appoint the same arbitrators a second time without the consent of all the parties;

XII. The arbitration fee shall be Five Dollars ($5.00) and expense for each arbitrator. In case of the failure of the arbitrators to decide the case, no fees shall be paid to them, but each arbitrator shall, nevertheless, be paid the actual expenses incurred by him in the case. In that event, the amount of such expense shall be divided equally between the parties and shall be paid by them through the Chairman of the Arbitration Committee;

XIII. The arbitrators are judges and not advocates. The case must be presented for arbitration by the parties themselves or by others not members of the sub-committee of three arbitrators acting in a given case

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We quote herewith a proposed arbitration clause for insertion in your contracts in cases where you desire that the dispute arising under such contract shall be determined by our arbitration system:

ARBITRATION CLAUSE

"All disputes arising under this contract shall be arbitrated in the usual manner, unless there is a regular Arbitration Committee appointed by the National Wholesale Grocers' Association and the National Food Brokers' Association, and indorsed by the National Canners' Association, for the district in which the dispute arises, and then by three members of such Arbitration Board. The decision of the arbitrators to be final and binding. Each arbitrator to be paid Five Dollars ($5.00) and necessary expenses Cost of the arbitration to be paid by the loser."

APPENDIX E

SIGNIFICANT COURT DECREES ON TRADE ASSOCIATION ACTIVITIES

(a) Gypsum Decree

IN THE
DISTRICT COURT OF THE UNITED STATES,
Southern District of New York

UNITED STATES OF AMERICA,
Petitioner,
vs.
GYPSUM INDUSTRIES ASSOCIATION,
et al.,
Defendants.

FINAL DECREE

This cause came on to be heard at this term, and upon consideration thereof, and upon motion of the petitioner by William Hayward, United States Attorney for the Southern District of New York, for relief in accordance with the prayer of the petition, and no testimony or evidence having been taken, and all the defendants therein having appeared by their attorneys Scott, Bancroft, Martin and MacLeish, Lyman M. Bass, Montague Lessler, George A. True, Roger I. Wykes and Frederick J. Powell and having consented thereto in open court; and upon the reading and filing of the petition herein, and upon the consent of the several defendants, and upon motion of the petitioner for relief in accordance with the prayer of the petition.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED, as follows, viz.:

(1) That the combination and conspiracy in restraint of trade and commerce, the acts, regulations, rules, resolutions, agreements, contracts and understandings in restraint of trade and commerce and the restraint of such trade and commerce obtained thereby as complained of in this petition to declare illegal and in violation of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental or additional thereto.

(2) That the said defendants and their officers, agents, servants and employees and all persons acting under, through, by or in behalf of them

or any of them, or claiming so to act, be and hereby are, ordered and directed to dissolve and forever discontinue said Gypsum Industries Association and be and hereby are perpetually enjoined, restrained and prohibited directly or indirectly from engaging in or forming any like association or from making any express or implied agreement of association or arrangement similar to or like said agreement or arrangement the effect of which would be to restrain or monopolize said trade and commerce in Gypsum products among the several States of the United States or in the District of Columbia, and from carrying out or continuing in effect the agreements described herein or making any express or implied agreements or arrangements together or with one another, like those hereby alleged to be illegal, or using any other means or methods the effect of which would be to prevent the free and unrestrained flow of such interstate trade and commerce in said Gypsum products, or to monopolize the same. Provided however that the said defendants are not restrained or enjoined from jointly organizing and maintaining a corporation, the charter or articles of incorporation of which shall be expressly limited to the following defined objects and purposes or any of them.

(a) To advance or promote the use of Gypsum products by all legitimate and lawful means, including research, publicity, advertisement and any other activities of like character.

(b) To deal with engineering and trade problems pertinent to the industry for the purpose of advancing the use of Gypsum products.

(c) To carry on educational work pertinent to the industry by fellowships in various schools and colleges for research; experimental and research work in and through institutions of learning, scientific bureaus and societies; and to provide for lectures and the writing and reading of papers upon subjects pertaining to the industry.

(d) To maintain a traffic bureau to furnish traffic information upon specific requests from published freight tariffs lawfully issued by the carriers and to assist the industry in transportation questions before Federal and State commissions and other bodies dealing with questions of transportation and with common carriers.

(e) To deal with improved methods of plant and mine operation including sanitation, safety appliances, accident prevention, labor, plant and mine development, housing conditions, insurance and methods of accounting.

(f) To maintain a credit bureau for the sole purpose of furnishing credit information.

(3) That the said defendants, their officers, agents, servants and employees and all persons acting under, through, by or in behalf of them or any of them, or claiming so to act, be perpetually enjoined, restrained and prohibited directly or indirectly from

(a) Agreeing to fix or establish by agreement among themselves the prices to be charged for said Gypsum products.

(b) Agreeing among themselves in any manner whatsoever to charge

purchasers of said Gypsum products uniform prices or doing by agreement any act or acts which will result in maintaining uniform prices.

(c) Agreeing among themselves in any manner whatsoever to advance or decrease prices for their products to purchasers thereof.

(d) Agreeing among themselves in any manner whatsoever to advise or communicate with one another as to proposed advances or decreases in prices for their products to purchasers thereof or agreeing among themselves in any manner whatsoever to circulate among themselves in any way information concerning or relating to such proposed advances or decreases, or to the prices charged or to be charged.

(e) Doing any act or acts by agreement among themselves which will result in advising or communicating with one another as to proposed advances or decreases in prices for their products to purchasers thereof or in circulating by agreement among themselves information concerning or relating to such proposed advances or decreases.

(f) Agreeing among themselves in any manner whatsoever to limit, curtail, restrict or otherwise control the amount of said product to be produced for manufacture at any time by any or all of the defendants or by doing by agreement among themselves any act or acts which will limit, curtail, restrict or otherwise control the production or manufacture of said products by any or all of the said defendants, such as the withdrawal of salesmen from a certain territory over stipulated periods.

(g) Agreeing among themselves in any manner whatsoever as to the territory in which any or all of the defendants may sell or otherwise dispose of their products.

(h) Agreeing among themselves in any manner whatsoever to effect any discrimination of any character, whether in prices charged or otherwise in favor of or against any purchaser of their products by reason of the fact that such purchaser is a mail order house, purchasing agency, co-operative buying association or so-called "Dealer," or for any other reason or doing any act by agreement among themselves to effectuate any such discrimination in favor of or against any purchaser for any reason, except of course that each defendant may independently of the other defendants select his or its own trade and dispose of his or its products to such persons and on such terms as he or it may choose.

(i) Agreeing among themselves to use a published credit list and credit information for the purpose of blacklisting an undesirable purchaser or for the purpose of putting the name of the purchaser on such list with the intent of the manufacturer who submits the name reserving the purchaser's business for himself.

(j) Agreeing to fix, establish, or maintain by agreement among themselves the terms, differentials, discounts or prices which should be followed by a dealer, jobber or other middleman upon his re-sale to a consumer or by any such agreement the uniform discounts which should be subtracted by each manufacturer, as an inducement for cash payment.

(k) Agreeing among themselves to adopt or follow any price list, published or compiled, or caused to be published or compiled by themselves or by any newspaper, trades paper or periodical as a fixed price.

(l) Agreeing among themselves to enforce any arbitrary freight rates in excess of those lawfully made.

(m) Agreeing among themselves that certain individual manufacturers engage in the manufacture of a certain Gypsum product of a certain definite composition, and that all other manufacturers desist from manufacturing a product of such composition.

(n) Aiding or abetting or assisting individually or collectively others to do all or any of the matters herein set forth and enjoined and restrained herein.

(4) That nothing herein contained shall be construed to restrain or interfere with the action of any of the said defendants acting with respect to his or its own corporate or individual business property or affairs, or from furnishing necessary information to their own customers in connection with bona fide sales of such products; or from doing individually any of the said act or acts done in good faith to meet competition when such action or the furnishing of such information is not made or done in concert or as the result of any agreement among themselves; or to save any patent rights of any of said defendants; and that this decree and any of its provisions or the entry thereof shall be without prejudice to the rights or interests of any of the said defendants in any proceedings which may be brought by or against them or any of them, except only any proceedings in this cause to enforce the terms of this decree.

(5) That jurisdiction of this cause be and hereby is retained for the purpose of enforcing this decree, and for the purpose of enabling any of the parties to apply to the Court for modification hereof if it be shown to the satisfaction of the Court, that by reason of changed conditions or changes in the statute law of the United States or in the interpretation of said law by the courts, or by reason of any new or different activities other than those hereby specifically authorized to be maintained and deemed necessary or desirable by the said defendants for the welfare of the Gypsum Industry or for any other reason, the injunctions hereby allowed have become inadequate, the provisions hereof have become inappropriate or unnecessary to maintain competitive conditions in interstate trade or commerce in Gypsum products, or have become unduly oppressive to the defendants and no longer necessary to secure or maintain competitive conditions in such interstate trade.

(6) That the defendants Ebsary, Gypsum Co., and Colorado Portland Cement Company not having consented to the foregoing decree, are in consequence, not bound by its terms and provisions.

JNO. C. KNOX,
U. S. D. J.

January 3, 1923.

(b) Tile Decree

IN THE DISTRICT COURT OF THE UNITED STATES,
Southern District of Ohio

UNITED STATES OF AMERICA, *Plaintiff*, v. TILE MANUFACTURERS CREDIT ASSOCIATION *et al.*, *Defendants.*	In Equity No. 201.

FINAL DECREE

The United States of America having filed its petition herein on the 11th day of January, 1922, and all of the defendants having duly appeared by A. R. Johnson and Agnew Hice, their solicitors of record, and having answered, and the cause being now at issue on the petition and answers;

Now comes the United States of America by Benson W. Hough, its attorney for the Southern District of Ohio, and by James A. Fowler and C. Stanley Thompson, Special Assistants to the Attorney General of the United States, and comes also all of the defendants herein by their solicitors as aforesaid; and it appearing to the court that it has jurisdiction of the subject matter alleged in the petition and that the petition states a cause of action; and the petitioner having moved the court for an injunction against the defendants as hereinafter decreed; and the court having duly considered the statements of counsel for the respective parties; and all of the defendants through their said solicitors now and here consenting to the rendition and entry of the following decree;

Now, therefore, it is ordered, adjudged and decreed as follows:

1. That the combination and conspiracy in restraint of interstate trade and commerce, the acts, regulations, rules, resolutions, agreements, contracts and understandings in restraint of interstate trade and commerce as described in the petition herein, and the restraint of such trade and commerce obtained thereby, are violative of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," known as the Sherman Anti-Trust Act.

2. That the contract of association dated April 24, 1917, between the defendant tile manufacturers, under which the defendant Tile Manufacturers Credit Association is organized, is a contract in restraint of interstate trade and commerce in violation of the aforesaid act of Congress, and the Tile Manufacturers Credit Association is in and of itself a combination in restraint of such trade and commerce and an unlawful instrumentality organized, operated and maintained for the purpose of carrying into effect the combination and conspiracy described in the petition herein, and constitutes a violation of said act of Congress of July 2, 1890,

entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," known as the Sherman Anti-Trust Act.

3. That the defendants and their officers, agents, servants and employees, and all persons acting under, by or in behalf of them or any of them, be, and they are hereby perpetually enjoined, restrained and prohibited from combining, conspiring or agreeing, expressly or impliedly, directly or indirectly, through any collective agency or agencies, or directly between themselves or any of them, to make or receive any or all of the reports described in the petition herein, or to collect and distribute the information or any part thereof specified in said reports, or either or any of them, or to make or receive any reports having the same general character or the same purpose and effect as said reports, or to collect and distribute information similar to that specified in said reports, or any part thereof.

Provided, however, that the defendants may, through the association, or corporation, hereinafter provided for, receive and compile for transmission to any governmental agency such information and statistics as it may request as to the production, shipments, the stocks on hand and the prices of tiles, but are restrained from distributing said information among themselves, except that information respecting sales may be collected annually and used to enable the assessment of the several members for their proportionate parts of the several expenses of the association, and for no other purpose.

4. That the defendants and their officers, agents, servants and employees, and all persons acting under, by or in behalf of them or any of them, or claiming so to act, be and they are hereby ordered and directed to dissolve and to forever discontinue defendant Tile Manufacturers Credit Association, and that they be and they are hereby perpetually enjoined, restrained and prohibited from directly or indirectly engaging in or forming any like association, from making any express or implied agreement of association or arrangement similar to or like said agreement or arrangement, from carrying out or continuing in effect the contracts and agreements described in the petition herein, from making any express or implied contracts, agreements or arrangements similar thereto and from using any other means or methods having the purpose or effect of restricting or restraining interstate trade and commerce in tiles.

Provided, however, that the defendants are not restrained or enjoined from maintaining an association, either voluntary or incorporated, for the following objects and purposes and none other:

(a) To advance or promote the use of tiles by research, publicity, advertisement and similar activities;

(b) To deal with engineering and trade problems for the purpose of advancing the manufacture and use of tiles and to secure the arbitration of trade disputes;

(c) To carry on educational work pertinent to the industry through fellowships in schools and colleges and experimental and research work, and the instruction of mechanics and training of apprentices and work-

men, and to provide for scientific research, lectures and the writing, reading and publication of papers on subjects pertaining to the industry;

(d) To maintain a traffic bureau to assist the industry in transportation matters before federal and state commissions and other bodies concerned in questions of transportation and tariff and also with common carriers, and, upon request of any member of the association, to furnish each member any information relating to rates upon its product or rules of transportation that may be contained in any public schedule or tariff, but all rates furnished shall be the actual rates between points of shipment and delivery, and shall not be based on any fixed or basing point;

(e) To improve sanitation, safety appliances, working conditions, accident prevention, employment, housing conditions, insurance, and matters of like character;

(f) To handle the insurance of its members, including fire, industrial, indemnity or group insurance;

(g) To maintain a credit bureau for the sole purpose of furnishing upon specific requests information as to the financial standing and the credit rating of persons and corporations purchasing or attempting to purchase tiles, but not to create directly or by inference a list or class of so-called legitimate or preferred dealers or purchasers. The gathering of information, solely for the purpose of providing credit information on special request, shall not be considered a violation of any part of this decree;

(h) To secure and maintain the standardization of quality and of technical and scientific terms, and the elimination of non-essential types, sizes, styles, or grades of products.

5. That the defendants, their officers, agents, servants and employees, and all persons acting under, through, or in behalf of them or any of them, be and they are hereby perpetually enjoined, restrained and prohibited from combining, conspiring or agreeing, expressly or impliedly, directly or indirectly, to do any of the following acts:

(a) To adopt or use a uniform basic price list, or to fix and adopt list prices for their products;

(b) To establish or maintain uniform prices for their products;

(c) To establish and maintain individual prices that are uniform for all class of purchasers or dealers and for all sales;

(d) To establish or maintain rules or regulations as to the acceptance of orders at prices in effect prior to changes therein;

(e) To establish or maintain uniform extra charges for built-up letters, for numbers or for beveled edges;

(f) To establish or maintain uniform limitations on the proportionate amounts of the lower grades of tile sold;

(g) To sell tiles f. o. b. factory with freight equalized with other factories in the United States manufacturing the same class of tiles;

(h) To compile and distribute freight rate books for use in making freight equalizations;

(i) To establish or maintain uniform terms of sale;

(j) To establish or maintain uniform conditions on or for the acceptance of orders;

(k) To establish or maintain uniform charges for barrels, half barrels, or boxes used for shipping tiles; to refuse to allow credit for old packages returned; to quote prices with package charges included, and to charge for packages whether used in shipment or not;

(l) To establish or maintain uniform conditions for the furnishing of tiles for sample purposes;

(m) To refuse to combine less than carload shipments into carload shipments invoiced to one of the purchasers;

(n) To refuse to sell to any persons or corporations because of any unpaid account or accounts;

(o) To formulate and establish or to retain in effect any requirements, circumstances, or conditions, non-conformity or non-compliance with which shall exclude any customer or customers from securing credit or shall impose any limitations or conditions whatsoever upon the credit granted;

(p) To restrict sales to dealers or contractors in tile or to establish uniform requirements for classification as dealers or contractors;

(q) To establish any system of co-operative purchasing of raw materials or supplies or of co-operative owning of the sources of raw materials, which shall eliminate or tend to eliminate competition in the purchasing of said materials or supplies;

(r) To adopt or to use a common trademark;

(s) To pool orders or to enter joint bids;

(t) To prepare and publish any list or lists of dealers or of certified dealers;

(u) To advise or communicate with one another as to proposed advances or decreases in prices or to circulate among themselves in any way information concerning or relating to proposed advances or decreases in prices, or to prices charged or to be charged;

(v) To effect in any manner whatsoever any discrimination of any character in favor of or against any individual or corporation purchasing or attempting to purchase tiles, by reason of the fact that such person or corporation is a mail-order house, or a dealer in other supplies or commodities, or a corporative purchasing association, or a building contractor, or for any other reason, or to do any act or acts to effectuate any discrimination in favor of or against any person or corporation for any reason whatsoever.

Provided, however, that nothing contained in this decree shall be construed as prohibiting any defendant from doing or performing any of the foregoing acts or from selecting his or its own trade and from disposing of his or its own products to such persons and on such terms as he or it may choose, if done individually and without combining, conspiring or agreeing with any other defendant or with any other manufacturer of tiles or other person.

6. Jurisdiction of this case is hereby retained for the purpose of enforcing this decree and of enabling the United States to apply to the court for a modification or enlargement of its provisions on the ground that they are inadequate, and the defendants or either of them to apply for its modification on the ground that its provisions have become inappropriate or unnecessary.

JOHN E. SATER,
District Judge

November 26, 1923.

(c) Cement Decree

No. E 22–25

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Southern District of New York.

UNITED STATES OF AMERICA, *Petitioner*,

v.

CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION, THE ATLAS PORTLAND CEMENT COMPANY, ALLENTOWN PORTLAND CEMENT COMPANY, ALPHA PORTLAND CEMENT COMPANY, BATH PORTLAND CEMENT COMPANY, COPLAY CEMENT MANUFACTURING COMPANY, DEXTER PORTLAND CEMENT COMPANY, THE EDISON PORTLAND CEMENT COMPANY, GIANT PORTLAND CEMENT COMPANY, THE GLENS FALLS PORTLAND CEMENT COMPANY, HERCULES CEMENT CORPORATION, KNICKERBOCKER PORTLAND CEMENT COMPANY, INC., LAWRENCE CEMENT COMPANY, LEHIGH PORTLAND CEMENT COMPANY, NAZARETH CEMENT COMPANY, PENN-ALLEN CEMENT COMPANY, PENNSYLVANIA CEMENT COMPANY, THE PHOENIX PORTLAND CEMENT COMPANY, SECURITY CEMENT AND LIME COMPANY, THE VULCANITE PORTLAND CEMENT COMPANY, E. P. ALKER, C. RAYMOND HULSART, MISS M. B. PHALEN, AND MARION S. ACKERMAN,

Defendants.

FINAL DECREE

Pursuant to a stipulation between counsel this cause came on to be heard on the petition and answer therein and the transcript of record in the case of United States v. The Atlas Portland Cement Company et al., which was tried in the criminal side of this Court beginning April 4th and ending May 26, 1922, and was argued by counsel, James A. Fowler and Roger Shale, Special Assistants to the Attorney General, for the Government, and John W. Davis, Archibald Cox and George T. Buckingham for the defendants, and on consideration thereof and in conformity with the written opinion filed herein on October 23, 1923, it is ORDERED, ADJUDGED and DECREED:

1. That defendant Cement Manufacturers Protective Association is

an unlawful combination of the defendant corporations in restraint of interstate trade and commerce in portland cement in violation of the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," known as the Sherman Anti-Trust Act.

2. That defendant corporations by becoming and acting as members of defendant Cement Manufacturers Protective Association and defendant individuals by becoming and acting as officers thereof entered into and engaged in an unlawful combination in restraint of interstate trade and commerce in portland cement in violation of said Act of July 2, 1890.

3. That defendant Cement Manufacturers Protective Association be and it hereby is dissolved, and defendant corporations and individuals are collectively and individually perpetually enjoined, restrained and prohibited from entering into, engaging in or carrying into further effect said combination, or any understanding or agreement constituting a part thereof, or any similar combination or organization having the same purpose and effect.

4. That defendant Association and the officers and members thereof are collectively and individually perpetually enjoined, restrained and prohibited from agreeing to make or receive and from making and/or receiving, pursuant to any agreement, reports of the following character and from collecting and disseminating through said Association, or other collective agency, the information specified in the following reports, or either or any of them:

(A) Reports by members to the Association giving details of specific job contracts, showing name of dealer, name of contractor, description of work, quantity sold, the price, quantity delivered to date, and balance to be shipped;

(B) Reports by members to the Association of changes in specific job contracts, i. e., increases, decreases and cancellations of quantities previously reported;

(C) Daily reports by the Association to its members summarizing the details of all specific job contracts filed with all members;

(D) Reports by members requesting further information about contracts taken by other members;

(E) Reports by checkers or inspectors giving the results of investigations of contracts about which information is desired;

(F) Reports by the Association to its members submitting checkers' reports on contracts under investigation;

(G) Reports by members expressing satisfaction with checkers' reports or requesting further investigation and pointing out possible discrepancies;

(H) Monthly reports by members to the Association giving information in detail as to the status of all contracts;

(I) Monthly reports by the Association to its members giving information in detail as to the status of contracts of all members;

(J) Quarterly reports by the Association giving the status of all specific job contracts on file with members, showing names of dealers, names of contractors, description of work, quantity sold, the price, quantity delivered to date, quantity cancelled, and balance to be shipped;

(K) Reports by members to the Association showing number of bags returned, the number accepted, and the number rejected;

(L) Reports by the Association to its members summarizing data concerning bags returned, accepted and rejected.

5. That defendant corporations are collectively and individually perpetually enjoined, restrained and prohibited from agreeing, among themselves, or with other manufacturers of cement, to cancel and/or from cancelling pursuant to such agreement contracts which may exceed, or may be believed to exceed, the actual requirements of specific construction work undertaken or definitely projected, or are duplicate contracts held by other manufacturers for cement intended for the same construction work; and from agreeing with each other, or with other manufacturers of cement, to collect, and/or from collecting pursuant to such agreement and distributing among manufacturers of cement, information with reference to such contracts.

6. That defendant Association and the officers and members thereof are collectively and individually perpetually enjoined, restrained and prohibited from agreeing to make or receive, and from making and/or receiving pursuant to any agreement, reports of the following character and from collecting and disseminating through said association, or other collective agency, the information specified in the following reports, or either or any of them:—

(I) Reports by members to the Association giving the quantity of clinker burned, cement ground, cement shipped, clinker in stock, and cement in stock;

(II) Reports by the Association to its members showing as to each member the quantity of clinker burned, cement ground, cement shipped, clinker in stock and cement in stock;

(III) Reports by members to the Association giving total shipments during a specified period of time;

(IV) Reports by the Association to its members showing shipments by each member during a specified previous period of time.

7. That defendant corporations are collectively and individually perpetually enjoined, restrained and prohibited from agreeing with each other to compile and distribute, and from compiling and distributing pursuant to such agreement, so-called freight rate books showing freight rates on cement from any arbitrarily established freight basing point to the points of delivery throughout the territory comprising their market.

But this shall not be construed as prohibiting the defendants from maintaining or subscribing to a traffic bureau to furnish rates or rules of transportation that may be contained in any public schedule or tariff,

but all rates furnished shall be the actual rates between points of actual shipment and delivery and shall not be based on any point or points other than those of actual shipment and delivery.

8. That nothing herein shall be construed as prohibiting defendant corporations from maintaining or subscribing to a credit bureau for the sole purpose of furnishing, upon specific requests, information as to the credit of persons and corporations purchasing, or attempting to purchase, cement, but the defendants are collectively and individually perpetually enjoined, restrained and prohibited from agreeing to refuse to make sales to particular customers and/or from agreeing upon circumstances or conditions which shall exclude customers from being extended credit.

9. That defendant corporations are collectively and individually perpetually enjoined, restrained and prohibited from hereafter agreeing among themselves or with other manufacturers of cement to do any of the following acts:

(a) To establish uniform mill base prices for their product;

(b) To establish arbitrary freight basing points other than the points from which shipments are actually made;

(c) To sell their product f. o. b. point of delivery exclusively;

(d) To establish uniform charges for bags, or uniform credits for bags returned in good condition;

(e) To establish a uniform rate of discount or uniform terms for payment of bills within a specified period;

(f) To limit the quantity of cement to be shipped to a dealer within a specified period of time;

(g) To prohibit the diversion or so-called misuse of cement sold on specific job contracts;

(h) To establish and maintain a uniform differential in the price of cement sold to dealers and contractors;

(i) To fix or suggest the amount of commission or profit dealers should be required to make in sales of cement;

(j) To regulate or limit the amount of production of cement, and/or the amount of stock to be kept on hand;

(k) To limit the time within which quotations on cement must be accepted and deliveries made, and to refuse to grant extensions in time of deliveries;

(l) To make changes in prices effective as of the date quotations are written, to avoid "price tipping";

(m) To guarantee prices against decline;

(n) To make uniform changes for bin tests, and/or to require the purchaser to pay for such tests.

10. That nothing contained in this decree shall be construed as prohibiting any defendant from doing or performing any of the foregoing acts or from selecting its own trade or from disposing of its own products to such persons and on such terms as it may choose, if done individually and without combining, conspiring or agreeing with any other manufacturer of cement.

11. That the injunctions herein contained against defendant Association and the defendant corporations shall apply to and be binding upon such Association and corporations and their respective officers, directors, agents and employees and all other persons, firms or corporations acting under, for or in behalf of them or any of them, or claiming so to act.

12. That jurisdiction of this case is retained for the purpose of enforcing this decree and of enabling the United States to apply to the court for a modification or enlargement of its provisions on the ground that they are inadequate, and the defendants or either of them to apply for its modification on the ground that its provisions have become inappropriate or unnecessary.

13. That petitioner shall have and recover from the defendant its costs.

JOHN C. KNOX
U. S. D. J.

December 13, 1923.

Assented to as to form only,

JAMES A. FOWLER
ROGER SHALE
Counsel for United States.

JOHN W. DAVIS
GEORGE T. BUCKINGHAM
ARCHIBALD COX
Counsel for defendants.

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